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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-187

FIRST AMERICAN BANK & TRUST COMPANY, A DOMESTIC CORPORATION, ROBERT M. HART, ROBERT N. CAMPBELL, LARRY SANDERS, HARVEY W. BOEN, ALBERT W. FETZER, RUTH M. HART, BERNARD H. HILLYER, ARNE J. SPRINGAN, JOHN F. SULLIVAN, CHARLES L. WELCH,

Petitioners,

VS.

G. W. ELLWEIN, STATE EXAMINER AND COMMISSIONER, DEPARTMENT OF BANKING AND FINANCIAL INSTITUTIONS; THE STATE BANKING BOARD AND VICTOR ABRAHAM, BANK EXAMINER, ALL OF THE STATE OF NORTH DAKOTA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

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INDEX

Opinions Below 2
Jurisdiction 2
Questions Presented for Review 2
Constitutional Provisions and Statutes Involved 3
Statement of Facts 8
Constitutional Questions Raised 14
Importance for Issuance of Writ 14
Reasons for Granting Writ 15
Conclusion 24

APPENDIX INDEX

Opinion of Supreme Court of State of North Dakota, June 28, 1974 ..... A1
Order of Supreme Court Denying Petition for Rehearing A27
Order of Supreme Court Staying Mandate until September 5, 1974 ..... A29
Affidavit of Gary R. McDaniel A29
Press release headlines beginning April 24, 1970 ..... A37
Order of District Court Judge Roy K. Redetzke, December 23, 1970 ..... A41
Letter of John R. Gordon, Special Assistant Atty. Gen. to Securities and Exchange Commission, June 15, 1971 ..... A44
Minutes of Banking Board meeting, June 28, 1971 ..... A52
Order of State Banking Board, January 17, 1972 ..... A54
Affidavit of G. W. Ellwein, July 6, 1971 ..... A59
Minutes of Banking Board meeting, August 9, 1971 ..... A64
Affidavit of Earle H. Campbell, June 26, 1972 ..... A66
Minutes of Banking Board meeting, January 17, 1972 .... A68
Minutes of Banking Board meeting, May 26, 1972 ..... A70
Complaint by State Banking Board, May 26, 1972 ..... A72

Special Appearance and Return of Respondents, June 15, 1972 ..... A79
Pages 1 through 10, Inclusive, Transcript of Hearing Before Banking Board, June 19, 1972 ..... A83
Memorandum Opinion and Decision, District Court Judge M. C. Fredricks, August 27, 1973 ..... A91
Specifications of Error Regarding Findings of Fact and Conclusions by Banking Board, December 12, 1972 ....A102

Table of Authorities

TABLE OF CASES

Edwardsen v. *Gray*, (E.D. Wis., 1972) 352 F. Supp. 839, 842 19
Estes v. *Texas*, 381 U.S. 532, 542, 85 S.Ct. 1628, 1632, 14 L.Ed.2d 543 16
Federal Constr. Co. v. *Curd*, 274 U.S. 200, 71 L.Ed. 1000, 47 S.Ct. 623 18
First American Bank & Trust Company v. *G. W. Ellwein, State Examiner, et al.*, 198 N.W.2d 84 ..... 9, 11, 12, 22, 23
First American Bank & Trust Company v. *G. W. Ellwein, State Examiner, et al., North Dakota District Court*, #21147 10
Gagnon v. *Scarpelli*, 411 U.S. 778 (1973) 22
Gibson v. *Berryhill*, 36 L.Ed.2d 488, 500, 411 U.S. 564, 93 S.Ct. 1689 (1973) 17, 21
Hammond Packing Co. v. *Arkansas*, 212 U.S. 322, 53 L.Ed. 530, 29 S.Ct. 370 16
Hawkins v. *Robinson*, (D. Conn., 1973) 367 F. Supp. 1025, 1030 19
In re Murchison, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 ..... 15, 16, 18, 19, 20

Local 134 International Brotherhood of Electrical Workers v. *N.L.R.B.*, (7th Circuit Court of Appeals, 1973) 486 F.2d 863 20

Miles v. *District of Columbia*, (D. of C., 1973) 354 F. Supp. 577, 583 19

Morrissey v. *Brewer*, 408 U.S. 471 (1972), 411 U.S. 786 22

Painter v. *Leeke*, (D. of S. C., 1973) 485 F. Supp. 427, 429 16

Payne v. *Lee*, (Minn.) 24 N.W.2d 259 ..... 18, 23

Pierce v. *Society of Sisters*, 268 U.S. 510, 69 L. Ed. 1070, 45 S.Ct. 571; 39 A.L.R. 468; 16 Am.Jur.2d, page 690 15

Pregent v. *New Hampshire Department of Employment Security*, (U.S. District Court, New Hampshire, 1973) 361 F. Supp. 782, 797 21

Re Application of Gault, 387 U.S. 1, 18 L.Ed.2d 527, 87 S.Ct. 1428 16

Re Buchman, 123 Cal. App. 2d 546, 267 P.2d 73; 47 A.L.R.2d 291 18

Sands v. *Wainwright*, (M.D. Florida, 1973) 357 F. Supp. 1062, 1084 19

Scott v. *McNeal*, 154 U.S. 34, 38 L.Ed. 896, 14 S.Ct. 1108 18

Securities and Exchange Commission of U. S. v. *First American Bank & Trust Company, et al., Southwestern District of North Dakota*, #1088 12

State ex rel. Holloway, Securities Commissioner and G. W. Ellwein, State Examiner v. *First American Bank & Trust Company, et al.*, #21143 10

State ex rel. Holloway, et al. v. *First American Bank & Trust Company, et al.*, 186 N.W.2d 573 10

Twigger v. *Schultz*, (3rd Circuit Court of Appeals, 1973) 484 F.2d 856, 861 20

Tyson v. *New York City Housing Authority*, (U.S. District Court, S.D. of N. Y., 1974) 390 F. Supp. 513, 522 21

U. S. ex rel. Haynes v. *McKendrick*, (2nd Circuit Court of Appeals, S.D. N. Y., 1973) 481 F.2d 152, 159 20

Wilson v. *Lincoln Redevelopment Corporation*, (8th Circuit Court of Appeals, 1973) (W.D. Missouri) 488 F.2d 339, 342, 343 19

STATUTES

28 U.S.C.A. 1257 (3) 2

XIV Amendment to the United States Constitution, Section 1 ..... 3, 16

North Dakota Constitution, Section 3 3

North Dakota Constitution, Section 22 3

North Dakota Century Code, Section 6-01-01 ..... 4, 9

North Dakota Century Code, Section 6-01-03 (1) 4-5, 9

North Dakota Century Code, Section 6-01-09 6-7

North Dakota Century Code, Section 6-01-15 ..... 7, 10

North Dakota Century Code, Section 6-05-28 ..... 7-8, 12

North Dakota Century Code, Section 6-05-29 ..... 8, 22

North Dakota Century Code, Section 32-06-08 22

North Dakota Century Code, Section 6-05 9

North Dakota Century Code, Section 28-32 9

TEXTS

K. Davis, Administrative Law Text, Sec. 12.04, page 250, 1972 17

16 Am. Jur. 2d, page 935 16

16 Am. Jur. 2d, page 988 18

16 Am. Jur. 2d, page 959 19

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

Petitioner, First American Bank & Trust Company, a domestic corporation, and the other persons named, who are its officers, directors, and some of its stockholders, hereinafter referred to as FAB, respectfully pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of North Dakota, entered in the above entitled case on June 28, 1974.

OPINIONS BELOW

The decision and opinion of the North Dakota Supreme Court in First American Bank & Trust Company, a domestic corporation, et aux v. G. W. Ellwein, State Examiner and Commissioner, Department of Banking and Financial Institutions, et aux, was made and filed the 28th day of June, 1974; the denial of petition for rehearing was made and filed on the 1st day of August, 1974; and the order of the Supreme Court of North Dakota granting a stay of mandate was made and filed on the 5th day of August, 1974. (Printed in Appendix)

JURISDICTION

The statutory authority for issuance of a Writ of Certiorari is 28 U.S.C. 1257, wherein it is provided that the court is authorized to issue a writ in any cause where a final judgment has been entered by the highest court of a state where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution of the United States.

Jurisdiction of this court is therefore invoked under the provisions of 28 U.S.C.A. 1257 (3).

QUESTIONS PRESENTED FOR REVIEW

1. Is the statutory scheme for the regulation of banking institutions, in North Dakota, constitutional?
2. Did FAB receive a fair hearing, pursuant to "due process of law", before said board?
3. Does the "Rule of Necessity" pertain when there is another tribunal or process available for remedy?

4. If a member of the State Supreme Court is subject to a bias, should he have participated in the appellate review?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 1, Fourteenth Amendment to the United States Constitution

The state of North Dakota is an inseparable part of the American union and the Constitution of the United States is the supreme law of the land.

Section 3, Constitution of North Dakota

All courts shall be open, and every man for any injury done him in his lands, goods, person or reputation shall have remedy by due process of law, and right and justice administered without sale, denial or delay. Suits may be brought against the state in such manner, in such courts, and in such cases, as the legislative assembly may, by law, direct.

Section 22, Constitution of North Dakota

Management and control—State department of banking and financial institutions.—

The state department of banking and financial institutions shall be under the supervision of the state banking board and a chief officer designated as the commissioner of banking and financial institutions, and known as the state examiner. Whenever the term state examiner is used in this Code, it shall mean the commissioner of banking and financial institutions. The state department of banking and financial institutions shall have charge of the execution of all laws relating to state banks, savings banks, trust companies, building and loan associations, mutual investment corporations, mutual savings corporations, banking institutions and other financial corporations, exclusive of the Bank of North Dakota and all credit unions, organized or doing business under the laws of this state. The same power granted herein to the state department of banking and financial institutions with reference to the corporations named in this section shall be granted to the state credit union board with reference to credit unions.

Section 6-01-01, North Dakota Century Code

State banking board and state credit union board.—

1. The state banking board shall consist of the state examiner and five members to be *appointed by the governor*, three of whom shall each have had at least five years' experience in an executive capacity in the management of a state bank in the state of North Dakota, one of whom shall have had at least five years' experience in an executive capacity in the management of any state or national bank in North Dakota, and one of whom shall have had at least five years' experience in an executive capa-

city in the management of any state chartered building and loan association. The term of office of the members of such board, other than the state examiner, shall be for a period of five years, except that the members appointed hereunder shall choose by lot which shall serve for one, two, three, four, or five years respectively, provided, however, that the members of the board serving in office at the effective date hereof shall continue to serve until the end of their respective terms and the term of no new member shall be set to end at the same time as the term of any board member in office. At the expiration of the terms of the members of the board in office at the effective date of this section, their replacements will be appointed as set forth herein. In case of a vacancy in such board, by death, resignation, or removal of an appointed member, the vacancy shall be filled by appointment by the governor for the unexpired term. The *state examiner shall be the chairman of such board* and the attorney general shall be, ex officio, the attorney for such board. The chief deputy examiner shall serve as its secretary. The board shall hold regular meetings in January, April, July, and October of each year in the office of the state examiner in the state capitol at Bismarck, and shall hold special meetings at the call of the state examiner in such place as he may designate within the state of North Dakota. The members of such board, other than the state examiner, shall receive twenty-five dollars per day and their actual necessary expenses for transportation while attending meetings, or in the performance of such special duties as the board may direct. In the event of travel by automobile, they shall receive the same mileage expense allowed state employees. (Emphasis added)

Section 6-01-03, North Dakota Century Code—Section 1

Supervision and examination by state examiner.—

The state examiner shall exercise a constant supervision over the business affairs of all financial corporations and institutions placed within the jurisdiction of the board. Personally, or through his deputy examiners, he shall visit each of the state banking associations at least twice each year, and he shall visit each of the other corporations and associations placed under his jurisdiction at least once each year, to examine into their affairs and ascertain their financial condition. Such visits shall be made without previous notice to the corporation or institution to be examined. The examiner shall inspect and verify the assets and liabilities of such institution to ascertain with reasonable certainty that the value of such assets and the amounts of such liabilities are correctly carried on its books. He shall examine the validity of mortgages held by savings institutions, and shall see that all of such mortgages are properly recorded. He shall investigate the method of operation and conduct of said corporations and institutions and their systems of accounting to ascertain whether such methods conform to the law and sound banking usage and principles. He shall inquire into and report any infringement of the laws governing such corporations and institutions, and for such purpose he may examine the officers, agents, and employees of such corporations and institutions and all persors doing business therewith. He shall report the condition of such corporations and institutions, and for such purpose he may examine the officers, agents, and employees of such corporations and institutions and all persons doing business therewith. He shall report the condition of such corporations and institutions, together with his recommendations or suggestions in connection therewith, to the state bank-

ing board, and the board may take such action as, in its discretion, the exigencies may demand.

Section 6-01-09, North Dakota Century Code

Examination by state examiner—Power over business, officers, and employees.—

The state examiner shall make a full, true, complete, and accurate examination and investigation of the affairs of each corporation doing business under this chapter once in each six months, or oftener if required to do so by a verified information in writing filed with him by any person interested in any trust with which any such corporation may be charged. Such examination shall be made without previous notice to the corporation to be examined The examiner shall assume and exercise over each such corporation and its business, officers, directors, and employees all the power and authority conferred upon him over banking and other financial or moneyed corporations or associations.

Section 6-05-28, North Dakota Century Code

Duty of state examiner when examination discloses violation of law.—

If it shall appear to the examiner from any examination made by him that any such corporation has committed a violation of the law or that it is conducting its business in an unsafe or unauthorized manner, or that the deposit made by it with the state treasurer, as hereinbefore provided, is insufficient to protect the interests of all concerned, the examiner, by an order addressed to such corporation, shall direct the discontinuance of such illegal or unsafe practice, and order it to conform with the requirements of the law or to make a further deposit with the state treasurer in an amount sufficient to insure the safety

of its trusts, deposits, and liabilities. Whenever any corporation shall refuse to comply with any such order, or whenever it shall appear to the examiner that it is unsafe or inexpedient for any such corporation to continue to transact business, he shall communicate the facts to the attorney general, who thereupon shall institute such proceedings against any such corporation as the case may require.

Section 6-05-29, North Dakota Century Code

Injunction against corporation—When granted.—

An injunction to suspend the general and ordinary business of a corporation must not be granted without due notice of the application therefor to the proper officer of the corporation, except when the state is a party to the proceeding.

Section 32-06-08, North Dakota Century Code

STATEMENT OF FACTS

This case involves more than a four year struggle by First American Bank & Trust Company, hereinafter referred to as FAB, to defend and save itself from a political and competitive conspiracy, under color of law, to take over or destroy it. (Affidavit of Gary R. McDaniel printed in appendix. Governor Guy referred to is now a candidate for U. S. Senate, his opponent in the forecoming primary is alleging corruption during candidate Guy's former administration as governor.) Mr. Herb Thorndahl, the then state examiner, is now President of the Bank of North Dakota, with the Attorney General of North Dakota recently asking for his resignation or dismissal. (Members of the Western Management Company are under indictment and awaiting trial.)

FAB is a Trust Company (only one of its kind) organized and operating in Bismarck, North Dakota, under a separate and special chapter of North Dakota law, 6-05 of the North Dakota Century Code, which grants its powers as a general corporation and banking institution with conveniences and privileges not enjoyed by banks generally.

The State Department of Banking and Financial Institutions is under the supervision of the State Banking Board and a chief officer designated as the Commissioner of Banking and Financial Institutions, and known as the State Examiner. (6-01-01 NDCC, printed in appendix) The State Banking Board consists of the state examiner and five members to be appointed by the governor, all of whom shall have experience in banking, national or state, and building and loan associations, with the state examiner as chairman of the board. (6-01-03 NDCC, printed in appendix)

The state examiner has been held by the State Supreme Court not be an administrative officer within ADMINISTRATIVE AGENCIES PRACTICES ACT (28-32 NDCC), whereas, the Banking Board was held such an agency. (*FAB* v. *Ellwein, et al.*, 198 N.W.2d 84, 93)

PRIOR TO THE "HEARING" by the State Banking Board in June, 1972, concerning the solvency and affairs of FAB, the State Examiner's, its chairman, and the other Board members' involvement included the following activities, conduct, and participation:

1. The State Examiner, in April and May, 1970, had issued cease and desist orders to FAB, pertaining to an issue of capital notes by FAB, which he had previously orally approved.

2. Press releases and news stories in local and statewide daily papers, and the electronic media, together with some in adjoining states, continued throughout the entire period, beginning with April 24, 1970, to date, concerning such involvements and conduct. (Headlines, only, of such articles printed in appendix.) In the cease and desist matter, press release was made before service on FAB.

3. FAB v. State and members of the Banking Board commenced in August, 1970, as Civil No. 21147 in the State District Court for a declaratory judgment on the capital note matter, the competency of the State Examiner, per se, under North Dakota law, and for one million dollars in damages.

4. The State Examiner and the State Securities Commissioner v. FAB, commenced on August 26, 1970, as Civil No. 21143 in the State District Court, alleging failure to register as security dealers, fraud, and jeopardy of depositors' funds, and seeking a temporary injunction.

5. December of 1970, District Judge Roy K. Redetzke issued order in favor of FAB. (Printed in appendix) *State v. FAB*, (3/31/71) 186 N.W.2d 573, 580 held capital notes not unlawful.)

6. May of 1971, State Examiner, after hiring as deputy examiners a partnership of CPAs from another city in the state, one of which partners was a stockholder and director of a competitive bank, in violation of state law, 6-01-15 North Dakota Century Code, conducted an examination of FAB, and directed in such examination how and what assets could be used in the examination report, and thus show a deficit capital.

7. Letter of Mr. John Gordon, Special Assistant Attorney General, representing the State Examiner, of June

15, 1971, to the Securities and Exchange Commission District Office at Denver, Colorado. (Printed in appendix)

8. The State Banking Board, with the State Examiner as chairman, held meeting on June 28, 1971, in which it discussed and considered and approved a report of examination made by the State Examiner showing FAB insolvent. (Minutes of meeting printed in appendix)

9. On June 28, 1971, the State Examiner State Banking Board issued ex parte orders to FAB, order #2 of which was declared void by the Supreme Court in *FAB v. Ellwein, et al.*, 198 N.W.2d 84. (Order #2 printed in appendix)

10. On July 6, 1971, the State Examiner executed and delivered his affidavit to the SEC stating FAB was insolvent. (Printed in appendix)

11. On August 9, 1971, members of the Board of Directors of FAB and the State Banking Board had an informal meeting in the office of the State Examiner at the State Capitol in Bismarck, North Dakota, at which time the State Banking Board refused to withdraw from its previous, decided, or adjudged position. (Minutes of said meeting printed in appendix)

12. August 26, 1971, because of statute of limitations, First American, its officers and directors, filed claims against the State Examiner and members of his department and the State Bonding Fund for damages totalling $4,400,000.00.

13. In September of 1971, Mr. Nicklawsky, then a member of the State Banking Board, made public statements about FAB and its officers and directors as being a bunch of crooks and that they would put them out of business. (Affidavit of Earle Campbell printed in appendix)

14. In November of 1971, the State Examiner conducted another, or second, examination in the year 1971, as required by statute, 6-05-28 North Dakota Century Code, with the same deputy examiners as hereinbefore stated and directed in the same manner what and how certain assets could be used in the examination report so that they showed FAB with a deficit capital.

15. January 17, 1972, the State Banking Board, with the State Examiner as its chairman, held a meeting at which time they reviewed, considered, and discussed the report of examination of FAB, conducted in November of 1971, and approved the same and issued ex parte orders to FAB. (Minutes of said meeting printed in appendix. Order #2 herein previously referred to printed in appendix and declared void in *FAB* v. *Ellwein, et al.*, 198 N.W.2d 84 by the Supreme Court of North Dakota, April 12, 1972.)

16. During this time, on July 9, 1971, the United States Securities and Exchange Commission had commenced an action seeking a temporary injunction and the appointment of a receiver against FAB in Civil No. 1088, the Southwestern Division of the Federal District Court for North Dakota. The Federal District Court, the Honorable Ronald M. Davies, stayed further proceedings because of the identical issues being considered in the State District Court. However, Judge Davies retired in the fall of 1971 and immediately thereafter the SEC renewed its petition and the Honorable Bruce Van Sickle held a hearing on the merits in February, during which the State participated through its deputy examiner as a witness, and thereafter, on March 27, 1972, in its memorandum opinion the Federal District Court held:

> "Briefly, the Securities and Exchange Commission is prosecuting its claim by relying on the work of the

North Dakota bank examiners to support its conclusions . . . but the examiners did not in fact make any market valuation of the assets of First American. . . . The plaintiff has not proved the defendant to be insolvent."

17. On May 26, 1972, the State Banking Board held another private meeting concerning FAB's affairs. (Minutes printed in appendix)

18. By notice of hearing and complaint, each dated May 26, 1972, the State Banking Board commenced its proceedings for a hearing before it in June of 1972 on matters pertaining to FAB. (Complaint printed in appendix) FAB entered a Special Appearance and Return to said complaint, dated June 15, 1972. (Printed in appendix)

19. The "hearing" before the said Banking Board was commenced on June 19, 1972, at which FAB restated its position as against the constitutionality of the hearing and the transcript of which shows such statements together with a designation of the relationship of the members of the State Banking Board as being competitors of FAB, and the manner of receiving evidence throughout the "hearing". (Pages 1 through 10, inclusive, transcript of said "hearing" printed in appendix)

From the foregoing circumstances, the Banking Board proceeded to hold the June, 1972, administrative agency "hearing", during which some members were absent for as much as one-half day at a time and others entered and left the room at various times to attend to personal and business matters. The "Hearing" resulted in the Banking Board making findings and conclusions commensurate with its previous declared void ex parte order, i.e., that FAB was insolvent, etc., which "Hearing" the State Supreme Court now says was fair (printed in appendix); and which

prompts this petition. Judge Kelsch, joined by Judge Giese, recognizes the fallacy, in their dissent.

The State District Court, Judge Fredericks, on appeal by FAB had reversed the Banking Board on constitutional grounds. (Printed in appendix)

CONSTITUTIONAL QUESTIONS RAISED

Constitutional and due process questions first raised in written response to Complaint of State Banking Board and its Notice of hearing (copy of response, dated June 15, 1972, printed in appendix); secondly, in opening statements at time of purported "hearing", June 19, 1972 (copy of pages 1-3 of pages 1-10 of transcript of "hearing" printed in appendix); thirdly, on appeal to State District Court (copy of Specifications of Error printed in appendix and copy of opinion declaring unconstitutional printed in appendix); and lastly, to State Supreme Court in Petitioners' (Appellees) Brief and Petition for Rehearing (part of record).

IMPORTANCE FOR ISSUANCE OF WRIT

The importance and special reasons for the issuance of this writ are that personal and property rights and reputations of local family, business, and professional men and women are being destroyed by the State Supreme Court opinion sustaining the actions of the state examiner and other members of the State Banking Board in that it has so far departed from prior decisions of this Court, and has so far departed from and sanctioned such departure from the usual and accepted course of proceedings of administrative agencies, with their quasi-judicial posture,

that justice cries out for an exercise of this Court's power of supervision, to assure the people of North Dakota, as well as those people who are affected in interstate commerce through the control of interstate banking conglomerates, that the constitutional guarantee of "due process of law" is meaningful!

REASONS FOR GRANTING WRIT

The state examiner conducted a "grand jury" type of investigation, in hiring deputy examiners and directing what could be included in their examination report of FAB so that it showed a deficit capital account. Then the state examiner presented, in "grand jury" fashion, to the other members of the Banking Board, with himself as Chairman, the examination report, which the Banking Board approved and then issued a complaint and notice of "hearing" to FAB, before them, to determine if FAB was insolvent, amongst other charges. They found FAB insolvent, guilty of fraud ad infinitum! At no time during the secret meetings held by the state examiner and subsequently by the state examiner and the other members of the board was FAB present or notified of such meetings. (Minutes of meeting printed in appendix) Needless to say, when the Banking Board, with the state examiner as Chairman, held its "hearing" (trial) there was no way in which FAB could defend itself. (*In re Murchinson*, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed 942) The state examiner (as hearing-trial judge) was a material witness unavailable to FAB, as were other members of the Banking Board.

FAB is a corporation fully entitled to the protection of the due process clause in its property or property rights. *Pierce* v. *Society of Sisters*, 268 U.S. 510, 69 L.Ed. 1070, 45 S.Ct. 571; 39 A.L.R. 468; 16 Am. Jur. 2d, page 690.

It is axiomatic that natural persons are entitled to protection of their property, property rights, and reputations. The named persons, parties with FAB, are its officers and directors and some of its stockholders.

The fundamental guaranty of due process is absolute, and not merely relative. *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322, 53 L.Ed. 530, 29 S.Ct. 370.

Due process of law is the primary and indispensable foundation of individual freedom; it is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise. *Re Application of Gault*, 387 U.S. 1, 18 L.Ed.2d 527, 87 S.Ct. 1428.

The protection (Fourteenth Amendment) extends to rights in the broadest sense of the term. In determining whether the requirement has been observed, regard must be had to substance rather than to form, for the mere form of the proceeding cannot convert the process used into due process of law. 16 Am. Jur. 2d page 935. (Citing cases) In the instant case, the form for the "hearing" was initially followed BUT the satutory scheme for such form is unconstitutional, and as shown hereinbefore, by involvement prior to the hearing, the substance of the "hearing" further dispells any semblance of "due process of law".

The North Dakota Supreme Court, while recognizing the "long, entangled past . . . maze of false starts, personal attacks, unbelievable allegations . . . massive administrative and legal effort", failed to recognize, as stated in *Painter* v. *Leeke*, 4th Circuit Court of Appeals, D. of S. C., October 15, 1973, 485 F. Supp. 427, 429; citing *Estes* v. *Texas*, 381 U.S. 532, 542, 85 S.Ct. 1628, 1632, 14 L.Ed.2d 543; in referring to *In re Murchison*:

"It is true that in most cases involving claims of due process deprivations may require a showing of identifiable prejudice to the accused. *Nevertheless, at times a procedure employed by the state involves such a probability* that prejudice will result that it is deemed inherently lacking due process." And further quoting Mr. Justice Black: "A fair trial and a fair tribunal is a basic requirement of due process. Fairness, of course, requires an absence of actual bias in the trial of cases. A fair system of law has always endeavored to prevent even the probability of unfairness. . . . To perform its high function in the best way, justice must satisfy the appearance of justice. (Citing cases) The requirement of *due process of law* in judicial procedure *is not satisfied by the* argument that *men of the highest honor and the greatest self-sacrifice* could carry it on *without danger of injustice.* Every procedure which would offer a *possible* temptation to the average man . . . to forget the burden of proof required to convict . . . or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law." (Citing cases) (Emphasis added)

Although the foregoing and other references are generally to judicial tribunals, "It has also come to be the prevailing view that most of the law concerning disqualification because of interest applies with equal force to . . . administrative adjudicators." (K. Davis, Administrative Law Text, Sec. 12.04, p. 250, 1972) *Gibson* v. *Berryhill*, 36 L.Ed.2d 488, 500, 411 P.S. 564; 93 S.Ct. 1689 (May 7, 1973).

Following the holding in the *Gibson* case, where those with possible personal benefit are constitutionally disqualified from holding hearings, we point out that in this

case members of the Banking Board, other than the Examiner, its Chairman, were owners or executives of competitive financial and banking institutions, regulated on a COMMUNITY basis, whereas FAB operates on a statewide basis and had customers in various communities where the banking facilities were otherwise controlled by members of the Board.

It will be further noted that this State Banking Board had no rules nor regulations for the management of those within its jurisdiction, so that any findings were necessarily arbitrary and violative of due process. *Re Buchman,* 123 Cal. App. 2d 546, 267 P.2d 73, 47 A.L.R.2d 291.

Due process requires that the tribunal be fair (citing *Re Murchison*) and impartial (citing *Federal Constr. Co.* v. *Curd,* 274 U.S. 200, 71 L.Ed. 1000, 47 S.Ct. 623) and *Payne* v. *Lee,* (Minn.) 24 N.W.2d 259, holding:

> "*The constitutional guaranty* recognizes as a primal necessity that there *be laws* providing *impartial* tribunals for the adjudication of rights." (Emphasis added)

Impartiality is lacking where a member of the tribunal has a pecuniary interest in the outcome of the proceedings. (Citing cases) And a statute which compels a litigant to submit his controversy to a tribunal of which his adversary is a member does not afford due process of law. 16 Am. Jur. 2d, page 988.

The prohibitions of the Fourteenth Amendment, against depriving any person of life, liberty, or property without due process of law or denying the equal protection of the laws, extend to all acts of the state, whether through its legislative, its executive, or its judicial authorities. *Scott* v. *McNeal,* 154 U.S 34, 38 L.Ed. 896, 14 S.Ct. 1108. And

is a restraint on the legislative, executive, and judicial departments of the state. 16 Am. Jur. 2d, page 959.

There is a direct analogy between the *Murchison* case and this case. We are confronted not only with a judge, the examiner, acting as a grand jury, but the entire Board, in such capacity, together with a Supreme Court Justice, whose personal secretary is the wife of one of the accused parties, being subject to bias. He voted wth the majority and could not possibly have voted in favor of the accused!

Cases citing *Murchison* have held that a new member of a disciplinary committee is disqualified from service thereon under circumstances similar to ours, and that the accused is entitled to a neutral and detached tribunal. *Sands* v. *Wainwright*, (M.D. Florida, Jan. 5, 1973) 357 F. Supp. 1062, 1084. And, the right of cross examination is of fundamental importance in administrative proceedings wherein ordinary rules of procedure are relaxed. *Hawkins* v. *Robinson*, (D. Conn., Nov. 21, 1973) 367 F. Supp. 1025, 1030. No such right was afforded accused herein during secret meetings of Board or, of course, at "hearing". In *Miles* v. *District of Columbia*, (D. of C., Jan. 26, 1973) 354 F. Supp. 577, 583, where the Court held "and, of course, an impartial decision maker is essential". From the foregoing prior involvements and newspaper publicity there could not be such impartial decision makers. In *Edwardsen* v. *Gray*, (E.D. Wis., Nov. 29, 1972) 352 F. Supp. 839, 842, that Court held that similar grand jury proceedings were a denial of due process, "*without a showing of actual bias*". (Emphasis added) Again, in *Wilson* v. *Lincoln Redevelopment Corp.*, (8th Circuit Court of Appeals, Nov. 9, 1973), (W.D. Missouri) 488 F.2d 339, 342, 343, "The critical determination here assessing the charge of partiality of decision maker is whether in weighing the evidence he is required to call on his own personal knowl-

edge and impression of what occurred. In such cases, *the tenant (accused) would be deprived of his right to examine and cross examine a crucial witness and the decision maker would become the arbiter of his own credibility and fairness.*" (Emphasis added) *U. S. ex rel. Haynes* v. *McKendrick,* (2nd Circuit Court of Appeals, June 14, 1973, S.D. N. Y.) 481 F.2d 152, 159, in dealing with discrimination and a jury verdict, it was held: ". . . our system of law has always endeavored to prevent even the probability of unfairness . . . and probability of prejudice we believe to be the correct test."

Further citing *Re Murchison,* the Court in *Local 134, International Brotherhood of Electrical Workers* v. *N.L.R.B.,* 486 F.2d 863 (7th Circuit Court of Appeals, Sept. 20, 1973), at 867, in referring to hearing examiners, held:

> "This is, we think, a specific manifestation of the congressional intent that administrative officers who preside at such hearing be completely 'isolated', 'impartial', and 'independent' (citing cases) and that there shall be no commingling of the functions of investigation or advocacy with the function of decision making."

And, in *Twigger* v. *Schultz,* (3rd Circuit Court of Appeals, Aug. 21, 1973) 484 F.2d 856, 861, the Court, in dealing with the fundamental question of combining the functions of investigative and adjudicator, held:

> "The possibility of improper taint from such dual functions is substantial . . . since the *adjudicating officer* reviewed the investigative reports of the special agent, *made at his direction* before recommending prosecution. We simply do not know what information was in those reports that does not appear in the record before us and that did not appear in the rec-

> ord reviewed by the Assistant Secretary when he accepted the District Director's recommended decision. We do know that, whatever may have been in the investigative reports, the petitioner had no opportunity to offer evidence in opposition or explanation." (Citing cases) (Emphasis added)

So, too, in this case, petitioners had no opportunity to sit in on the discussions of the secret meetings of the state examiner of report made by and at his direction, and the other members of the Banking Board, attorneys and deputies, when decisions as to conditions were made prior to any purported "hearing", which the State Supreme Court later upholds as fair, impartial, and just.

Following *Gibson* v. *Berryhill, supra*, the Court in *Tyson* v. *New York City Housing Authority*, (U.S. District Court, S.D., New York, Jan. 9, 1974) 390 F. Supp. 513, 522, held:

> "Insofar as the claim of *prejudged guilt is concerned it is also clear that an impartial decision-maker is a basic constituent of rudimentary due process.* (citing cases) Any other collateral procedural guarantees are largely without meaning if the deciding tribunal has *in some way prejudged the merits* of the case." (Citing cases) (Emphasis added)

Further, following Gibson, the Court in *Pregent* v. *New Hampshire Department of Employment Security*, (U.S. District Court, District of New Hampshire, July 11, 1973) 361 F. Supp. 782, 797, held:

> ". . . For administrative review to be meaningful each review officer must not have had any prior official involvement with the case before him."

In *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973) this Court reaffirmed the principle of *Morrissey* v. *Brewer*, 408 U.S. 471 (1972) that one of the minimum elements of such hearings is "an independent decisionmaker". 411 U.S. at 786.

The activities, involvement, and prejudgment on the part of the State examiner and other members of the Banking Board, in this case, do not qualify as such an independent or impartial decisionmaker.

With respect to the "Rule of Necessity", the inability of the Banking Board to act would not have left the matter without a tribunal for a fair determination. North Dakota Century Code 6-05-29 (printed in appendix) provides that the Attorney General of the State, ". . . shall institute such proceedings against any such corporation as the case may require". This surely contemplates a court action, and 32-06-08 N.D.C.C. (printed in appendix) provides an injunctive remedy without notice, ". . . when the state is a party to the proceeding", thus giving protection to the public or aggrieved parties in cases of emergencies! *In this case, no trial on the merits has been held before a state district court!!!* Cases have been started but none to date has been heard. Motions and preliminary matters only had been heard by state courts, before the State Supreme Court directed the matter to a hearing before the Banking Board (*FAB* v. *Ellwein, State Examiner, et al.*, 198 N.W.2d 84, April, 1972). *The irony, at this time, in the opinion sought to be reviewed, is that the Honorable C. F. Kelsch (State District Court Judge called to sit on the case) wrote the opinion in FAB, supra, and in this opinion wrote a dissent stating that no financial institution under the jurisdiction of the State Banking Board, as now constituted, could have a fair and impartial hearing!* We should add that in *FAB, supra*, two state district

court judges were called to fill the five member Supreme Court and in the present instance, three state district court judges were called to fill vacancies by personal disqualification.

There occurred the further unfortunate circumstance in that counsel for petitioners herein learned on July 5, 1974, after opinion by State Supreme Court had been filed (June 28, 1974), that the wife of one of the accused parties was the personal secretary of one of the Justices of the State Supreme Court. This was called to the Court's attention in Petitioners' Petition for Rehearing. The position of this Justice raises the subject of bias, since he voted wth the 3-2 majority in *FAB*, *supra*, and in this case. In *Payne* v. *Lee*, (Minn., July, 1946) 24 N.W.2d 259, 264, the Court in considering bias:

> "Bias disqualifies a judge, whether it be born of a selfish or pecuniary interest in the outcome of the suit or of an overpowering personal spleen directed toward one of the litigants. Neither the cause of, nor the motive for, the bias is of any consequence. It is enough if bias from any cause deprives a judge of his impartial status (citing cases) . . . It has frequently been said that at common law, as administered in England and the United States, bias not the result of interest or relationship is not supposed to exist; but it is to be noted that the later English cases hold that where a real likelihood of bias from any cause is shown to exist a judge is thereby disqualified. (citing cases) Lord Chancellor Cave said: '. . . if there is one principle which forms an integral part of the English law, it is that every member of a body engaged in judicial proceeding must be able to act judicially; and it has been held over and over again that, if a member of such a body is subject to a bias WHETHER FINAN-

CIAL OR OTHER in favour of or against either party to the dispute OR IS IN SUCH A POSITION THAT A BIAS MUST BE ASSUMED, he ought not to take part in the decision or even to sit upon the tribunal.' (Emphasis supplied)

"Impartiality is likewise the very foundation of the American judicial system. (Citing numerous cases)."

This Court should grant this Petition for Review to uphold the guarantee of impartiality, unbiased, unprejudged, and fair hearings pursuant to due process of law established by the Fourteenth Amendment to the United States Constitution.

CONCLUSION

With the reputation, personal liberties, property and property rights of FAB, its officers and directors, who are some of its stockholders, and are community, family, business and professional men and women, together with hundreds of depositors, trustors and beneficiaries of trusts, at stake, this Court in granting this Petition will have thwarted one of the greatest schemes for corruption through political, administrative, and judicial practices in the United States!

Respectfully submitted,

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P. O. Box 1874
Bismarck, North Dakota 58501
Counsel for Petitioner

APPENDIX

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

First American Bank & Trust Company, a domestic corporation, Robert M. Hart, Robert N. Campbell, Larry Sanders, Harvey W. Boen, Albert W. Fetzer, Ruth M. Hart, Bernard H. Hillyer, Arne J. Springan, John F. Sullivan, Charles L. Welch,

Appellees

v.

G. W. Ellwein, State Examiner and Commissioner, Department of Banking and Financial Institutions; the State Banking Board and Victor Abraham, Bank Examiner, all of the State of North Dakota,

Appellants

Civil No. 8967

(Filed June 28, 1974)

1. The statutory scheme for the regulation of banks is constitutional.

2. Due process of law presupposes a fair and impartial hearing before a fair and impartial tribunal.

3. An administrative board is not a judicial tribunal and due process does not require a judicial trial; the combination of investigative, accusative, and adjudicative functions in one board is not, of itself, a denial of due process.

4. A presumption exists that the Board's official duty was regularly performed.

5. The Rule of Necessity, whereby otherwise disqualified officers may serve if there is no other tribunal, is applicable to State administrative agencies.

6. It is not a violation of due process to sit on a case after an officer expresses his opinion that certain types of conduct are prohibited by law.

7. The fundamental requirement of due process is opportunity to be heard.

8. Substantial evidence to support the findings of an administrative board will cause this court to affirm that board's orders.

(Syllabus by the Court)

Appeal from the District Court of Burleigh County, the Honorable M. C. Fredricks, Judge.

JUDGMENT REVERSED.

Opinion of the Court by O'Keefe, D. J.

Frederick E. Saefke, Jr., Box 1874; Lundberg & Nodland, Box 1675, Bismarck, for Appellees.

Allen I. Olson, Attorney General, Bismarck; Frank F. Jestrab and John R. Gordon, Special Assistant Attorneys General, Box 1526, Williston, for Appellants.

Civil No. 8967

First American Bank & Trust Company

v.

Ellwein

O'Keefe, D. J.

This case has a long, entangled past. There will be no attempt to summarize in detail all of the various forms of litigation and hearings. We will sketch a broad outline that will assist in understanding this opinion. The prior procedures are a maze of false starts, personal attacks, un-

believable allegations, and a series of appeals. We view this case in that context. The central fact is that the State Banking Board (hereinafter referred to as the "Board") has undertaken a massive administrative and legal effort to close down the operations of First American Bank & Trust Company, a Bismarck corporation (hereinafter referred to as "FAB").

The immediate case is an appeal from the findings of the Board on December 12, 1972, ordering a receiver be appointed to liquidate FAB on the basis of insolvency. The administrative hearing leading to this order began on June 19, 1972, continued through June 29, 1972, and resumed again for two days in September. The transcript from such hearing is literally voluminous. The Honorable M. C. Fredricks, District Judge, reversed the decision of the Board and found that FAB was not afforded a fair hearing, and that the findings of insolvency were not supported by the evidence.

Here is the case-by-case appellate history:

(1) *State ex rel. Holloway* v. *FAB,* 186 N.W.2d 573 (N.D. 1971). The State Securities Commissioner and the State Examiner in 1970 began injunctive proceedings against FAB alleging bad practices in the conduct of its business. The case was remanded to District Court for further proceedings.

(2) *State ex rel. Holloway* v. *FAB,* 197 N.W.2d 14 (N.D. 1972). A second appeal from a pre-trial order was made. Upon the remand, the trial court appointed a special master to examine FAB records. The State Examiner, after this action commenced, found FAB to be insolvent and such report was filed with an approval by the State Banking Board on June 28, 1971. FAB then asked to amend the pleadings to raise the

issue of solvency. The trial court denied the request and the Supreme Court agreed.

(3) *FAB* v. *Ellwein*, 198 N.W.2d 84 (N.D. 1972). The State Examiner issued two orders: 1. to have FAB relinquish all records, and 2. to in effect stop doing business or in the alternative show cause before the Board on July 1, 1971 why a receiver should not be appointed. The trial court found both orders void and the State Examiner then appealed. District Judge C. F. Kelsch, writing for this Court, said Order No. 1 was within the power of the State Examiner, acting for the Board. He then said, however, that FAB could obtain a hearing on both orders before the full Board, that is, an ex parte order of the State Examiner is subject to review by administrative hearing before the Board and the Board's decision is a subject of District Court appeal.

(4) *FAB* v. *Ellwein*, 474 F.2d 933 (C.A. 1973). FAB sought injunctive relief against a hearing by the Board. The Eighth Circuit remanded the case back to Federal District Court to reflect abstention from action rather than a decision on the merits. The net effect was to leave open the question of a "fair hearing" and see how the state courts viewed it.

(5) *Securities & Exchange Commission* v. *FAB*, 481 F.2d 673 (8 C.A. 1973). SEC sought an injunction against FAB. The Eighth Circuit did agree partly with the contentions made by SEC but we cannot see where the decision had a bearing on our issues.

There are three issues presented by this appeal:

1) Is the Board properly constituted and thus able to act?

2) Did FAB receive a fair hearing before the Board?

3) If so, was there sufficient evidence to sustain the findings of the Board declaring insolvency?

If the answer to either of the first two issues is in the negative, our work is ended because, obviously, it would then make no difference as to what the findings of the Board were. Numerous charges of conspiracy, wrongdoing and impropriety have been leveled at State officials, Board members and others. This writer and other judges questioned in oral argument how this Court could consider statements indicating a conspiracy to down FAB that were made outside of the record. We shall not repeat these charges, because to do so would be insulting, and, moreover, we are not going to deal with them in our decisional process. The trouble is, none of the charges are supported by the record we have before us. The evidence considered by the District Court and by this Court shall be confined to the record filed with the Court. 28-32-19, N.D.C.C. To consider unrebuttable charges would violate the fundamental concept of fair play and due process that FAB urges upon us.

The District Court has said that the makeup of the Board is "all wrong." FAB makes the point that bankers should not judge bankers. No matter how chosen, a board rarely can be ideally constituted. Should we have no bankers on the board? There is no inherent reason why a banking board should not have bankers sitting just as a bar grievance committee has lawyers.

We do not think the statutory scheme of regulation is unconstitutional. Our laws seem to provide a sensible requirement for the appointment to the Board. 6-01-03,

N.D.C.C. This statute was amended in 1969 to broaden membership on the Board to loan associations. The recent case of *Gibson* v. *Berryhill,* 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed.2d 488 (1973), upheld a contention that the Alabama Board of Optometry was unconstitutionally constituted and so did not provide an adequate administrative remedy. The Supreme Court agreed with the conclusion that the State Board was so biased by prejudgment and pecuniary interest that it could not constitutionally conduct hearings looking toward the revocation of a license to practice optometry. There were two sources of possible bias—prejudgment of the facts or personal interest in the outcome by the board members. The Supreme Court said that those with substantial pecuniary interests in legal proceedings should not adjudicate those disputes.

The logic of this holding applies with some force in our case. *Gibson, supra,* determined there was a serious question of personal financial stake in the matter in controversy because the board excluded from membership a large group of salaried optometrists and sought to enjoin them from practicing their profession. We think the pecuniary interest of our Board in this case is rather vague and certainly slight. It stretches the point to say that a Board member from, say, Kindred, North Dakota, is going to be benefited by putting FAB out of business. The "interest" of the Board would arise from taking a prior position which, in the nature of things, is hard to reverse. We are, therefore, not saying, as did the trial judge, that the Board, as composed, is ipso facto unconstitutional because it has banker-members. We cannot say that the requirements for membership on the Board are irrational, or that they bear no reasonable relationship to the function of the Board, or that they exclude a segment of the banking community.

FAB argues that it really had no hearing on the merits and desperately wants one. At best this is a fragile argument for two reasons: They did indeed have a hearing and they did participate in it by extensive examination of witnesses. The fact that they made a "special appearance" and did not perhaps participate to the full extent available was a matter of their choice. The danger of abstention was a risk they knowingly undertook and even though it may not have changed the result they shall not now be heard to say they have had no hearing. The role of Mr. Saefke, FAB's attorney, was more in the nature of a general appearance. But see *Northern Pac. Ry. Co. v. McDonald*, 42 N.W.2d 321 (N.D. 1950). The question of the type of appearance is not now important because the Board did have jurisdiction and, as shall be seen, it did conduct the hearing within due process guidelines.

Aside from their role, or non-role in the hearing, was it "fair"? FAB says, in a colorful display of verbiage, the hearing that was held was designed in the great tradition of the Old West to be a fair trial before the hanging. The Board had already been deeply embroiled in efforts to declare FAB insolvent. The State Examiner is chairman of that Board. These efforts took the form of various legal actions in Federal and State courts as previously referred to. It is apparent that counsel for the Board took an active part in cooperating and exchanging information with the SEC, which, in turn, presumably resulted in their entry into the fray. After these efforts were unsuccessful they turned to an administrative hearing. The State Examiner had, to some extent, determined the condition of the Bank by the issuance of his prior orders. Mr. Frank F. Jestrab, as attorney for the Board, filed a Complaint against FAB. He represented the Board in all the litigation. The Board approved the report of insol-

vency by its examiner *prior to the hearing*. This is not to say the findings are incorrect. The correctness of the findings does not make the hearing fair. Due process of law presupposes a fair and impartial hearing before a fair and impartial tribunal. The board hearing the case should be a qualified board without prejudice and strictly impartial as to the issues to be tried. *Smith* v. *Department of Registration, Etc.*, 412 Ill. 332, 106 N.E.2d 722 (1952); see, *In re Murchison*, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955). As a general proposition of law we accept the preceding sentence, but the circumstances of our case require the consideration of other factors, and we do not think our decision violates that proposition.

It is unfortunate in light of the powers and duties placed upon the State Examiner that he is also required to act as chairman of the State Banking Board, which is the board which must ultimately decide what action is proper with regard to all complaints, reports and recommendations made by this same Examiner. We invite the attention of the Legislature to this structural weakness. The involvement of the State Examiner is more than ministerial. Where investigation, prosecution and decision rest with the same body, its members should be zealous in the recognition and preservation of the right to a hearing by impartial triers of the fact. We suggest that it has the appearance, if not the substance of partiality, to allow the Examiner to sit in judgment at these hearings. To perform its high function in the best way, justice must satisfy the appearance of justice. *Offutt* v. *United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 13, 99 L.Ed. 11 (1954). We realize that for now the State Examiner could not step down without abrogating a statutory command. The Examiner is, at once, accuser and judge.

In discussing the make-up of the Board itself, we note that many administrative agencies such as the Banking Board are charged by statute with a tripartite responsibility of performing investigative, accusative, and adjudicative functions.

The mere fact that all three functions are combined in one board is not in itself a denial of due process. *Pangburn* v. *Civil Aeronautics Board*, 311 F.2d 349 (1st Cir. 1962), at page 356; *Griggs* v. *Board of Trustees*, 61 Cal.2d 93, 37 Cal. Rptr. 194, 389 P.2d 722 (1964); *Fireman's and Policeman's Civil Service Commission* v. *Hamman*, 404 S.W. 2d 308 (Tex. 1966); and *Borman* v. *Tschida*, 171 N.W.2d 757 at 764 (N.D. 1969). However, as stated in footnote No. 17 in *Gibson* v. *Berryhill*, *supra*,

> "The extent to which an administrative agency may investigate and act upon material facts of a case and then consistent with due process, sit as an adjudicative body to determine those facts finally has occasioned some divergence of views among federal courts..."

While it may be well established that such combination of functions in administrative agencies or boards does not per se violate due process, we must carefully scrutinize the facts in this case to determine if due process has been violated.

What constitutes due process within an administrative proceeding? While recognizing that the adjudicative function of the Board is quasi-judicial in nature, we have never held that the minimal due process that must be afforded participants before an administrative board or agency is synonymous with minimal requirements of due process in a court of law. To do so would be to create a second judicial branch without statutory authority and

add to time required in the disposition of administrative decisions.

In *Brinkley* v. *Hassig*, 83 F.2d 351 (10 C.A. 1936), a case in which the Kansas State Medical Board revoked the license of Dr. Brinkley to practice medicine and surgery in Kansas, the court stated it was established for the purposes of its decision in *Brinkley* because of prior State court litigation and a dismissal of an appeal to the United States Supreme Court involving an earlier appeal by Dr. Brinkley, that:

> "(5) The board is not a judicial tribunal, and due process does not require a judicial trial, and the character of the hearing is not measured by standards of judicial procedure." 83 F.2d 351 at 356.

In *In re Township 143 North, Range 55 West, Cass County*, 183 N.W.2d 520 (N.D. 1971), an appeal from the State Board of Public School Education, an administrative board, wherein we considered the question of what constitutes an unfair, arbitrary, or discriminatory hearing before an administrative board, we concluded that there must be an absence of one of the elements deemed essential to due process of law without specifically enumerating what those essential elements are.

> "To constitute an unfair, arbitrary or discriminatory hearing before an administrative agency, the defect or practice complained of must be such as might lead to a denial of justice or there must be an absence of one of the elements deemed essential to due process of law. An examination of the record on this appeal shows equal opportunity to present evidence, and that such evidence and applicable statutes to have been carefully considered by the administrative agency.

"Upon appeal to the Supreme Court from a judgment of the district court, entered on appeal from the decision of an administrative agency, the scope of appeal is limited. The decision of the agency must be affirmed unless the court finds that the decision of the agency is not in accordance with law, or that it is a violation of the constitutional rights of the appellant, or that any of the provisions of the Administrative Agencies Practice Act have not been complied with in the proceedings before the agency, or that the rules of procedure of the agency have not afforded the appellant a fair hearing, or that the findings of fact made by the agency are not supported by the evidence or that the conclusions and decision of the agency are not supported by its findings of fact. Section 28-32-18, N.D.C.C.; *Application of Northern States Power Company*, 171 N.W.2d 751 (N.D. (1969); *In re Superior Service Company*, 94 N.W.2d 84 (N.D. 1958)." *In re Township 143 North, Range 55 West, Cass County, supra*, 183 N.W.2d 520 at 534.

Here, the statute does not provide for the disqualification and temporary replacement of board members or for a substitute tribunal. When challenged, must a board member or the entire board refuse to act, leaving no substitute board and providing no forum for a hearing on the alleged violations of law? The courts have treated this question as presenting a comparison of wrongs or a choice of two evils. When confronted with this problem, the courts have relied upon the so-called "Rule of Necessity" to require otherwise disqualified officers to serve when no provision has been made for a substitute tribunal.

In reviewing the challenged lack of due process at the administrative hearing, due to bias, we begin with the presumption that the Board regularly performed its

duty and accordingly afforded FAB and the depositors due process at the administrative hearing by refusing to allow any possible previous bias or prejudgment to interfere with its decision based upon evidence presented at the hearing.

> "31-11-03. Disputable presumptions.—All presumptions other than those set forth in section 31-11-02 are satisfactory if uncontradicted. They are denominated disputable presumptions and may be contradicted by other evidence. The following are of that kind:
>
> * * *
>
> "15. That official duty has been performed regularly;" N.D.C.C.

Nevertheless, the Bank asserts it was denied a fair hearing in a multitude of ways. Rather than attempt to recite all the publicity and harassment that the Bank asserts prejudiced it, we refer to the prior litigation. It is our view that the facts, the statutes, and our prior decision left the Board with no alternative other than conducting a hearing to determine the issue of insolvency. See, *FAB* v. *Ellwein, supra.* It would be anomalous, if not ridiculous, for this court to advise an administrative hearing and then tag the hearing with being void after it is held, unless there was an intervening circumstance, which we do not find.

The Rule of Necessity was early recognized by the United States Supreme Court in *Evans* v. *Gore*, 253 U.S. 245, 40 S.Ct. 550, 64 L.Ed. 887, 11 A.L.R. 519 (1920). The case is no longer followed on the constitutional question of taxation decided therein, but it remains a useful and reliable guide in deciding cases which may call for the applicability of the Rule of Necessity. In *Evans*, a United

States District Judge for the Western District of Kentucky as plaintiff sought a refund for taxes paid under protest. The question the Supreme Court was faced with was whether under the Constitution Congress has the power to tax the compensation of Federal Judges. In support of the Rule of Necessity, the court said:

> "Because of the individual relation of the members of this court to the question, thus broadly stated, we cannot but regret that its solution falls to us; and this although each member has been paying the tax in respect of his salary voluntarily and in regular course. But jurisdiction of the present case cannot be declined or renounced. The plaintiff was entitled by law to invoke our decision on the question as respects his own compensation, in which no other judge can have any direct personal interest; and there was no other appellate tribunal to which under the law he could go. He brought the case here in due course, the Government joined him in asking an early determination of the question involved, and both have been heard at the bar and through printed briefs. In this situation, the only course open to us is to consider and decide the cause,—a conclusion supported by precedents reaching back many years. Moreover, it appears that, when this taxing provision was adopted, Congress regarded it as of uncertain constitutionality and both contemplated and intended that the question should be settled by us in a case like this." *Evans* v. *Gore*, *supra*, 253 U.S. 245 at 247, 248.

Even though the judges were directly interested in the outcome, they were not disqualified, for the reason that no other tribunal existed to hear the issue.

The Rule of Necessity is not confined to judicial proceedings, but is equally applicable to State administrative

proceedings. In *Brinkley* v. *Hassig, supra*, Dr. Brinkley alleged that the revocation proceedings should be set aside because the medical board members were prejudiced against him and had been active in the bringing of the charges against him. The court agreed that in all probability all the board members were in fact prejudiced, but it refused to set aside the action of the board.

The Tenth Circuit Court of Appeals stated:

> "If an administrative tribunal may on its own initiative investigate, file a complaint, and then try the charge so preferred, due process is not denied here because one or more members of the board aided in the investigation." *Brinkley* v. *Hassig, supra*, 83 F.2d 351 at 357.

The court concluded:

> "Assuming such preconceived prejudice, what is the answer? The statute provides but one tribunal with power to revoke a doctor's license, just as the Supreme Court of Kansas is the only body with power to disbar a lawyer. If such powers may not be exercised if the members of the board or court are prejudiced, then any lawyer or doctor who commits an offense so grave that it shocks every right-thinking person, has an irrevocable license to practice his profession if he can get the news of his offense to the court or board before the trial begins. That will not do. The commendable efforts of the medical and legal professions to raise the standards of their professions by cleaning their own houses cannot be set at naught by any such rule of law.
>
> "From the very necessity of the case has grown the rule that disqualification will not be permitted to destroy the only tribunal with power in the prem-

ises. If the law provides for a substitution of personnel on a board or court, or if another tribunal exists to which resort may be had, a disqualified member may not act. But where no such provision is made, the law cannot be nullified or the doors to justice barred because of prejudice or disqualification of a member of a court or an administrative tribunal." *Brinkley* v. *Hassig, supra*, 83 F.2d 351 at 357.

In *The Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 68 S.Ct. 793, 92 L.Ed. 1010 (1948), it was expressly noted that in administrative proceedings, substitute tribunals rarely exist and that generalized attitudes in advance of a hearing are not necessarily regarded as constituting a disqualifying bias. The Cement Institute was a trade association whose members had been accused of restraining competition by agreeing to use a multiple-basing point system of pricing. The hearing lasted for over three years, producing 49,000 pages of oral testimony and 50,000 pages of exhibits. Before any decision was announced, the Commission was asked to disqualify itself on the basis of prejudgment, bias, and prejudice, because of reports the Commission had made to Congress, the President, and to various congressional committees, which evidenced the opinion that a multiple-basing point system was a price-fixing device which violated the Sherman Anti-Trust Act. Although the court assumed such opinions were formed because of prior official investigations, the court held that these generalized attitudes did not disqualify the Commission.

"In the first place, the fact that the Commission had entertained such views as the result of its prior ex parte investigations did not necessarily mean that the minds of its members were irrevocably closed on the subject of the respondents' basing point prac-

tices. Here, in contrast to the Commission's investigations, members of the cement industry were legally authorized participants in the hearings. They produced evidence—volumes of it. They were free to point out to the Commission by testimony, by cross-examination of witnesses, and by arguments, conditions of the trade practices under attack which they thought kept these practices within the range of legally permissible business activities.

"Moreover, Marquette's position, if sustained, would to a large extent defeat the congressional purposes which prompted passage of the Trade Commission Act. Had the entire membership of the Commission disqualified in the proceedings against these respondents, this complaint could not have been acted upon by the Commission or by any other government agency. Congress has provided for no such contingency. It has not directed that the Commission disqualify itself under any circumstances, has not provided for substitute commissioners should any of its members disqualify, and has not authorized any other government agency to hold hearings, make findings, and issue cease and desist orders in proceedings against unfair trade practices. Yet if Marquette is right, the Commission, by making studies and filing reports in obedience to congressional command, completely immunized the practices investigated, even though they are 'unfair,' from any cease and desist order by the Commission or any other governmental agency.

"There is no warrant in the Act for reaching a conclusion which would thus frustrate its purposes. * * *" *Federal Trade Com.* v. *Cement Institute, supra,* 92 L.Ed. 1010 at 1034, 1035.

Regarding the argument of a claimed denial of due process, the court said:

> "Neither the Tumey decision nor any other decision of this Court would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law. In fact, judges frequently try the same case more than once and decide identical issues each time, although these issues involve questions both of law and fact. Certainly, the Federal Trade Commission cannot possibly be under stronger constitutional compulsions in this respect than a court." *Federal Trade Com.* v. *Cement Institute, supra*, 92 L.Ed. 1010 at 1035.

There are instances when the Rule of Necessity does not apply. E.g., *State ex rel. Miller* v. *Aldridge*, 212 Ala. 660, 103 So. 835, 39 A.L.R. 1470 (1925). Lack of due process, reaching constitutional gravity, does not yield to any "Rule of Necessity". The Rule of Necessity and the question of due process are really dissimilar concepts and should not be confused. A suspect person's sitting on a board does not, of itself, render the whole proceeding void for lack of due process. In this case, we are saying there is adequate due process and therefore the Rule of Necessity must prevail.

We earlier stated that the minimal due process that must be afforded participants before an administrative board is not synonymous with the minimal requirement of due process in a court of law. The fundamental requirement of due process is the opportunity to be heard. *Goldberg* v. *Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). As the final body entrusted with the responsibility of making our Constitution a living force against

heavy-handed administrative decision, we have proceeded in this case with great caution. Our trust must be in the integrity of legally constituted boards to act upon the evidence alone. Judicial review of those actions is the ultimate due process protection accorded those aggrieved. We can find no evidence that taints the hearing itself and as we have already said, we cannot consider extra-record allegations. Let us now review the results of that hearing.

There is no need to further burden this opinion with an itemization of all the indicia of insolvency, fraud, and mismanagement. To do so would run the opinion into a hundred pages. We ask not so much whether we will reach the same decision on the same grounds as did the Board, but rather, was the decision arrived at properly and is it supported by substantial evidence? Both sides have accused the other of juggling figures. Witnesses, with varying portions of expertise, all testified that in their opinion the assets of FAB were insufficient to pay its liabilities. This Court has no power to substitute its own opinion for the judgment of qualified experts in matters entrusted to administrative agencies. See, *FAB* v. *Ellwein, supra,* at 106, with numerous other citations there referenced. The Examiner and his deputies have all had accounting training (most are Certified Public Accountants) and the Examiner, by statute, has the discretion to determine whether the particular instances of accounting practices conform to the law and sound banking usage. FAB's President, Mr. Hart, said he believed FAB's assets were sufficient to pay its liabilities. Leaving aside the question of Mr. Hart's qualifications to so testify, we are unconvinced that his testimony is acceptable on that score. While we do not accuse FAB of any creative accounting, we simply cannot accept such an opinion in the face of such overwhelming evidence to the contrary.

Let us detail some of the significant items of insolvency:

1. FAB had from 1963 to 1969 a net operating loss of $227,118.30; a loss of $16,270.36 in 1970 and $152,031.31 in 1971; as of December 31, 1971 the capital account was exhausted and there was a deficit of $42,870.47.

2. Contrary to generally acceptable principles of accounting, FAB consistently entered as earnings the gross amount to be received during the full term of a property lease in the year the lease was executed. Thus, the effect was overstating the income in the year the lease was executed.

3. "Capital Notes" sold were not approved by the State Examiner as required by law and they were sold to trusts of which FAB itself was trustee—a curious piece of self-dealing seemingly contrary to 6-05-15, N.D.C.C., and well recognized standards for the investment of trust funds. These notes were subordinate to the claim of depositors but this was not fully disclosed to the buyers. Subsequently, the note holders were informed of an opportunity to convert to a higher interest rate certificate but were not told they had to actually "borrow" the money by signing a note. (A note for their own money! The Mad Hatter would have liked this plan.)

4. There were suspect financial dealings between Mr. Hart and New Prince Hotel which was owned by him. Also, such dealings took place between FAB and Standard Investment Company, another Hart family enterprise. Standard showed a net profit of $15.49 in 1970. Yet an unsecured loan of

$65,000.00 was made to it. Incidentally, nearly 20 *percent of all loans and leases* were made without adequate security to Mr. Hart or his family enterprises.

5. Bismarck Investment Corporation, owned by Hart, had no operating statement but received a $54,000.00 loan which was classified by FAB as a loss.

6. A loan was made to Hart's son and his corporation although the income sources of the corporation were, if not non-existent, nebulous.

7. An unsecured loan was made to Mr. Campbell, a vice-president of FAB, for $12,129.98 *when he was bankrupt.* He then borrowed $19,500.00 from FAB at a later date to repay a loan made to him by Mr. Hart.

While our primary concern throughout the examination of the record has been with the question of insolvency, we must make a concluding comment about the overall operation of this banking institution. We believe that the powers and duties of the State Banking Board as defined in 6-01-04, N.D.C.C., allow for the enforcement of such orders as in its judgment may be necessary or proper to protect the public and the depositors of a financial institution. Continued operating losses, confusing and ridiculous letter exchanges between officers, unacceptable accounting practices to overstate income, excessive self-dealing between officers and their families, misleading, if not false, advertising on insurability of deposits, all lead to complete justification by the Board in closing down this operation. We have no evidence that the Board acted from malice, self-interest or any other improper motive. Our review, limited to the record, indicates there is sub-

stantial evidence to support the findings of fact made by the Banking Board. *Suedel* v. *North Dakota Workmen's Compensation Bureau*, 218 N.W.2d 164 (N.D. 1974); *In re Township 143 North, Range 55 West, Cass County, supra; Williams Electric* v. *Montana-Dakota Utilities Co.*, 79 N.W. 2d 508 (N.D. 1956). Accordingly, the order of the Board appointing a receiver to liquidate the bank is affirmed and the judgment of the District Court is reversed, and the District Court is directed to enter judgment on remand affirming the order of the State Banking Board.

/s/ James H. O'Keefe, D.J.

/s/ (Illegible)

/s/ Ralph J. Erickstad, C.J.

Associate Justices Harvey B. Knudson, Wm. L. Paulson and Robert Vogel deeming themselves disqualified did not participate; the Honorable C. F. Kelsch and the Honorable Emil A. Giese, District Judges of the Sixth Judicial District and the Honorable James H. O'Keefe, District Judge of the Second Judicial District, sitting in place of the disqualified justices.

Civil No. 8967

First American Bank & Trust Company

v.

Ellwein

Giese, D. J. (concurring specially)

I concur in Judge Kelsch's concurrence, with the understanding that paragraph numbered 3, page 4, is intended to mean that the Board would render an opinion relative to complaints initiated and findings made by the State Examiner, only after due hearing on the merits.

/s/ Emil A. Giese D. J.

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

First American Bank & Trust Company, a domestic corporation, Robert M. Hart, Robert N. Campbell, Larry Sanders, Harvey W. Boen, Albert W. Fetzer, Ruth M. Hart, Bernard H. Hillyer, Arne J. Springan, John F. Sullivan, Charles L. Welch,

Appellees,

- vs -

G. W. Ellwein, State Examiner and Commissioner, Department of Banking and Financial Institutions; the State Banking Board and Victor Abraham, Bank Examiner, all of the State of North Dakota,

Appellants.

Civil No. 8967

C. F. KELSCH, DISTRICT JUDGE, CONCURRING SPECIALLY.

I concur in the opinion of the court, with one important exception. I do not agree with the inference or implied conclusion that the State Banking Board, as now established under our statute, constitutes a fair and impartial administrative tribunal before which any financial institution under its jurisdiction can have a fair and impartial hearing; from which I dissent and desire to state my reasons therefor.

It is well settled in this State:

(1) That where the constitutionality of a statute depends upon the power of the legislature to enact it, its

validity must be tested by what might be done under color of the law and not what has been done.

Herr v Rudolf, N.D. 25 N.W.2d 916

(2) That this court has no power to declare any legislative enactment or law of this State unconstitutional, unless at least four of the Judges decide that its invalidity is clear beyond a reasonable doubt.

Section 89 of the State Constitution;

State ex rel Mason v Baker, 69 N.D. 488, 288 N.W. 202

An analysis of our banking laws, in so far as they relate to a determination of the insolvency of any financial institution under its jurisdiction, discloses that they not only authorize but expressly require:

(1) That the state examiner, while acting in a purely administrative capacity, must find and determine whether the financial institution which he has examined is, in fact, insolvent;

(2) That the State Banking Board, while acting in a purely administrative capacity, must approve or disapprove the examiner's findings that the bank which he has examined is, in fact, insolvent; and

(3) That the state examiner and the State Banking Board, while acting in a quasi-judicial capacity, must sit in judgment to review and pass upon the necessity, reasonableness or validity of its prior decision that the financial institution involved was, in fact, insolvent.

I am firmly convinced:

(1) That the legislative scheme which unites investigative authority, accusatory and adjudicatory functions,

in one administrative agency is unsound in principle, unwise in public policy, inconsistent with common experience and violative of the fundamental requirement of due process of law, as established by the recent decisions of the Supreme Court of the United States.

In re Murchison, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942;

Kinsella v United States, 361 U.S. 234, 80 S.Ct. 297, 4 L.Ed.2d 268;

Goldberg v Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287;

Morrisey v Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed. 484;

Gibson v Berryhill, 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed.2d 488

(2) That where the state examiner and the other members of the State Banking Board are required by statute, while acting in a purely administrative capacity, to determine whether the financial institution in issue is, in fact, insolvent, that in such case it is reasonable to find and conclude that each member has a vital, personal interest in the outcome of the proceeding before the board, while it is acting in a quasi-judicial capacity; and consequently it is unreasonable and inconsistent with common experience to believe and to find that any member would admit that he made a mistake, that he acted arbitrarily or in bad faith in breach of his official duties. On the contrary, their self-interest would actuate and persuade them to use and exercise all of the power and influence of their official position to defend and justify their prior decision that the bank in issue was, in fact, insolvent.

(3) That where the members of an administrative agency are required to prejudge the issue which they

are to try upon the merits, they cannot, by reason of their bias and prejudice, act as independent or impartial decision makers;

Goldberg and Morrisey, supra

That such legislative policy is, in my judgment, not only repugnant to and inconsistent with but also offends the principle of fundamental fairness essential to constitute due process of law.

Kinsella, supra

While courts have no power to legislate by judicial fiat, (Shermoen v Lindsey, N.D. 163 N.W.2d 738) I firmly believe I have the right and the explicit duty to recommend the enactment of timely, remedial legislation, so as to provide, in effect:

(1) That the state examiner be removed as a member and chairman of the State Banking Board, so that he will have no authority to act in a quasi-judicial capacity.

(2) That the State Banking Board be relieved and absolved from the duty and responsibility of approving or disapproving the state examiner's findings that any bank under its jurisdiction, which he has examined, is insolvent, while acting in a purely administrative capacity, so that the board will not have to sit in judgment of and be required to pass upon the necessity, reasonableness or validity of its prior decision by approving the state examiner's report.

(3) That the board should not only have the right but the clear legal duty to review the state examiner's findings of insolvency and to either approve or reject the same, if the clear weight of the evidence before it justifies such a determination.

I firmly believe that the enactment of such remedial legislation:

(1) Would remove the serious doubt, which now exists, as to the constitutional validity of our statutes; and whether the State Banking Board, as now established, constitutes a fair and impartial administrative tribunal before which a fair and impartial hearing can be had by any financial institution under its jurisdiction;

(2) Would protect every financial institution in this State from the unreasonable, arbitrary or oppressive action of the state examiner;

(3) Would protect both the public and private interests in the financial institutions of this State in case of an emergency;

(4) Would protect and safeguard the right of all financial institutions in this State to the constitutional guarantee of due process of law; and

(5) Would put an end to the protracted, highly expensive, needless and unjust litigation that has been before this court in this controversy between these parties; and thereby make a substantial contribution to the improvement of administrative justice in this State.

/s/ C. F. Kelsch
C. F. Kelsch, District Judge

STATE OF NORTH DAKOTA
Supreme Court
Bismarck

Clerk of the Supreme Court
Mrs. Luella Dunn

August 1, 1974

Frank F. Jestrab and
John R. Gordon
Special Assistant Attorneys General
Box 1526
Williston, North Dakota 58801

#8967 FIRST AMERICAN BANK v. ELLWEIN, ET AL.

The Court has today entered an order denying the petition for rehearing in this case. However, the Honorable Emil A. Giese would have granted the rehearing.

In accordance with Rule 41(a) of the North Dakota Rules of Appellate Procedure, the mandate of the Supreme Court will be issued after the expiration of seven days.

Sincerely yours,

/s/ Luella Dunn
Luella Dunn
Clerk

LD:je

cc: Frederick E. Saefke, Jr.
Lundberg & Nodland
The Honorable M. C. Fredricks
The Honorable Ralph J. Erickstad

STATE OF NORTH DAKOTA
Supreme Court
Bismarck

Clerk of the Supreme Court
Mrs. Luella Dunn

August 6, 1974

Mr. Frederick E. Saefke, Jr.
Attorney at Law
Box 1874
Bismarck, North Dakota 58501

FIRST AMERICAN BANK v. ELLWEIN, ET AL
Civil #8967

Enclosed is a copy of an order signed by the Honorable Ralph J. Erickstad in this case.

Sincerely yours,

Catherine Fox
Deputy Clerk
Encl.

cf

cc & encl: Mr. Frank F. Jestrab
The Honorable Norbert J. Muggli
The Honorable Emil A. Giese
The Honorable C. F. Kelsch
The Honorable James O'Keefe
Irvin B. Nodland
The Honorable Ralph J. Erickstad

First American Bank v. Ellwein et al—#8967

ORDERED, that the Mandate be stayed until September 5, 1974.

Dated this *5th* day of August, 1974

/s/ Ralph J. Erickstad
Chief Justice
Supreme Court

Affidavit

STATE OF NORTH DAKOTA

ss

COUNTY OF BURLEIGH

Gary R. McDaniel, being first duly sworn, on oath deposes and says:

In February of 1967 I became a stockholder and director of Western Management Corporation, a group organized originally to set up a chain of Banks in North Dakota. The stockholders and directors consisted of the following members: Larry Erickson, Hayden Thompson, Herb Meschke, Gary Williamson, Mark Purdy, Richard Backes, Richard Dobson and Gary McDaniel.

Western Management, together with a buy and sell agreement with the M. T. Thompson estate, owned 51% of the stock in the First Western State Bank of Minot, North Dakota. This company also secured a bank charter for the City of Cando, North Dakota but later sold all its interest to the people of Cando. Western Management was the company used to analyze all the requests and information regarding the new bank charters. Another bank project investigated at this time was the bank in Milbank, South Dakota.

At the board meeting in either April or May of 1967, the formation of a new bank in Bismarck, North Dakota was discussed. Many of the members of Western Management had been approached by individuals asking us to start a bank in the Bismarck area. These individuals included Mr. and Mrs. Robert Feragen, Don Hurtz, Helgi Nygren, Lloyd Omdahl, Vernon Peterson, Lloyd Ernst and others. In July of 1967 a motion was passed by the directors of Western Management that it back the Bismarck Bank project with time and money.

In June and July of 1967 we proceeded on the assumption that a new bank charter would be best. There were many meetings. At 9:30 A.M., on Thursday, June 1, 1967, and again at 9:15 A.M., Friday, June 2, 1967, I visited with Larry Erickson and Lloyd Everson about deposit prospects in the Bismarck area. At 2:30 P.M., Wednesday, August 2, 1967, I visited with Lloyd Everson about a new bank charter in Bismarck. I discussed with Charles Conrad, Tuesday, June 6, 1967, at 9:40, the support a new bank in Bismarck might expect. The same day I visited at Towner, North Dakota, with Hayden Thompson as to what actions we should take regarding the Bismarck Bank. On June 26, 1967, I sent letters to Gene Rich, Herbert Meschke, H. H. Thompson, Larry Erickson, Richard Backes, Richard Dobson, Gary Williamson, Mark Purdy explaining we were going ahead with New Bank charter application in Bismarck, North Dakota.

In July I dicussed the bank charter with and got approval from the following people:

(1) 5:50 P.M., Tuesday, July 11, 1967. Ed Smith, Scott Anderson and Tom Pearce.

(2) 6:00 P.M., Thursday, July 13, 1967. My wife and I had dinner with Governor and Mrs. Guy and dis-

cussed the new bank in Bismarck. Both Mr. and Mrs. Guy encouraged the application even to the point of discussing the possibility of Governor Guy working for the Bank.

(3) 3:00 P. M., Wednesday, July 19, 1967. We asked Gorman King to support our application and he agreed.

(4) Also during this time we worked and had meetings with the Banking Department and Federal Agencies.

During the week from Friday, August 11, 1967, to Wednesday, August 12, 1967, I discussed the Bismarck Bank with Herb Thorndahl and Gil Ellwein at Louisville, Kentucky. Just after getting back to North Dakota Mr. Thorndahl, Mr. Thompson, Mr. Meschke and I discussed the problems of the application of a new bank charter.

Herb Thorndahl explained that he felt our application would be influenced by Judge Lynch's decision regarding the Williston bank situation. He expressed his belief that our application would be followed shortly by an application by Bob Hart. We had lost two other previous applications because of some decisions. On advice of legal counsel, Herbert Meschke, we decided to not make Bismarck Bank application at that time.

Hayden Thompson and I discussed with Herbert Thorndahl what could be done. Mr. Thorndahl stated he felt it was just a matter of time before Bob Hart and his Trust Company were put out of business. Mr. Thorndahl agreed to do everything in his power to remove Hart and his Trust Company from the financial scene. Based on Mr. Thorndahl's assurance that he would eliminate Bob Hart as a threat we continued to do organizational work.

8:00 A.M., Thursday, August 24, 1967. I was informed by Larry Erickson that Bill Guy was interested in the

presidency of a new Bismarck Bank. Larry Erickson told me Governor Guy did not want to run for Governor again and wasn't going to run against Senator Young. Also Bill Guy still had children in school and he did not want to move out of Bismarck. At 11:40 Thursday, August 24, 1967, I discussed the Bank with Vern Peterson who wanted us to consider leasing space in a downtown complex. Also the same day I asked Richard Ista to support our new bank and informed him that Governor Guy would be involved. He agreed to support us.

On August 29, 1967, at 7:30, Western Management held a meeting regarding the Bismarck Bank. It was decided that Governor Guy would be president and we agreed we had to get rid of Bob Hart and his Trust Company. Hayden Thompson explained that Herb Thorndahl had assured us he would do everything in his power to remove Hart as a threat to our application. Also on this date I visited with Chub Ulmer and Lloyd Omdahl by telephone. Both Mr. Ulmer and Mr. Omdahl were supporting our efforts. We were interested in them putting whatever pressure they could on Hart. They said they would try.

At 6:00 P.M., August 31, 1967, I discussed the Hart problem with Ross Watson and Hayden Thompson at the Holiday Inn at Bismarck. We called Thorndahl and suggested he should get more critical of Hart's Trust Company loan portfolio. We felt this would force some of Hart's directors to pressure him to lay off the new bank application or at least if we had to buy him out this would reduce his sale price. Thorndahl agreed to get critical on the loan portfolio.

10:30 Friday, September 8, 1967. I talked to S. F. "Buckshot" Hoffner about supporting our new bank in Bismarck. He agreed. On Monday, September 11, 1967,

at 6:30 P.M., a meeting was held at the Ramada Inn at Minot regarding the new bank at Bismarck. Those in attendance were Gary McDaniel, Roger Phelps, Herb Thorndahl, Richard Backes, Gary Williamson, Larry Erickson. We discussed the problem of the Trust Company and how we could overcome this handicap. It was the groups feeling at this time that we should buy Hart out but felt his price would be too high. We wanted to deal like Gene Rich had in Fargo, that is, buy the loan portfolio for about 25 cents on the dollar.

I attended the following meetings for the purpose of gaining support for the Bismarck Bank:

(1) Friday, 10:30, September 29, 1967 and Wednesday, October 4, 1967 at 12:00, Arnold Ketterling Basin.

(2) Friday, October 6, 1967, at 9:00, Tom Pearce of Bismarck.

(3) Sunday, October 8, 1967 at the Diplomat Hotel, Denver, Colorado. Chris Nathan, National Farmers Union. Mark Purdy and I asked Chris if he would support our bank in Bismarck, he agreed.

(4) October 12, 1967, 10:00 A.M. Meeting with Herb Meschke, Hayden Thompson and myself. We decided to advise the Western Management group that it would be wise to hold off our application until spring of 1968. This would allow Thorndahl time to work out problems relating to Bob Hart and his Trust Company.

(5) Friday, November 3, 1967 at 10:30. Directors of Western Management held a meeting at First Western State Bank in Minot. Present were Richard Backes, Larry Erickson, Gary Williamson, Hayden Thompson, Gary McDaniel. It was agreed that further action regarding the Bismarck Bank should be halted until early spring of 1968

or such time Herb Thorndahl felt it safe to proceed with our application.

The next real action regarding Western Management and the Bismarck Bank occurred in April of 1968 when the Board of Directors decided to abandon the Bismarck Bank Charter application until after the 1968 election. This group through Larry Erickson advised the Governor that we were not interested in the Bank deal. LBJ had decided not to seek another term and we felt Governor Guy had to head the state democratic ticket. This was the last meeting I was at regarding the Western Management group and the Bismarck Bank. However, later on I did meet with Scott Anderson and Herb Thorndahl regarding the situation. We agreed that after the election if Thorndahl did not receive the Presidency of the Bank of North Dakota he would approve a new bank charter for both Bismarck and Fargo and he would be president of the Fargo Bank.

Beginning in June of 1967 and continuing until early 1968, I delivered to Herb Thorndahl approximately $5,000.00 in cash. This money was arranged through cashiers checks, expense checks, and notes. Additional Bank records are needed to document these expenses.

During the week from Friday, August 11, 1967, through August 17, 1967, we gave Mr. Herb Thorndahl the following money:

(A) Food, drinks, girls (Cash paid in First Western Bank expense checks #6047, #3198 and #3263.) $950.00

(B) One way fare to Louisville, Kentucky. Expense check #4018 payable to Pietsch Flying Service. 400.00

During early 1968 we gave Mrs. Thorndahl a round trip fare to Hawaii. 336.00

Also Mr. and Mrs. Thorndahl were given approximately $960.00 for food, drinks, car rental, etc. 960.00

Some of the monies and services promised Mr. Thorndahl were delivered after the decision to abandon the Bismarck Bank Charter until after the 1968 election. These monies and services include:

(A) 5 rooms at Ramada Inn plus food and drinks on First Western Bank expense (checks #4864, #4793 and #5172.) 380.00

(B) 3 girls at $200.00 each. 600.00

(1) Diane Clayton

(2) S. Barnett

(3) Melanie Wetzel

Plus $200.00 in cash. 200.00

All of there expenditures were paid from License Agency (check #179 dated June 6, 1968.)

(C) Joan Parks entertained Mr. Thorndahl at the Holiday Inn at Bismarck, North Dakota sometime between June 19th and June 20th, 1968. Mrs. Parks received $500.00 in cash plus $150.00 expenses for her services paid by License Agency (check #266.) 650.00

(D) We entertained Mrs. Thorndahl at Billings in direct relation to the Bismarck Bank application. 250.00

All of the above expenses were paid Mr. Thorndahl for services given to the Western Management group. These services and considerations included removing Bob Hart and his Trust Company from blocking our Bank application at Bismarck, North Dakota.

/s/ Gary R. McDaniel
Gary R. McDaniel

Subscribed and sworn to before me this 11th day of December, 1970.

/s/ Maryann Cassatt
Maryann Cassatt, Notary Public
Burleigh County, North Dakota
My Commission Expires 6/21/73.

DATE	PUBLICATION	HEADLINE
04/24/70	Bismarck Tribune	"CAPITAL NOTE SALES ORDERED HALTED"
08/27/70	Bismarck Tribune	"ORDER RESTRAINS FIRST AMERICAN"
08/28/70	Bismarck Tribune	"SECURITIES SUIT SAID A REPRISAL"
08/29/70	Bismarck Tribune	"FIRST AMERICAN FILES COUNTERSUIT"
08/30/70	Morning Pioneer	"FIRST AMERICAN SUES FOR $1 MILLION"
09/29/70	Bismarck Tribune	"BANK RESTRAINING ORDER IS EXAMINED BY JUDGE"
09/30/70	Morning Pioneer	"INJUNCTION SOUGHT FOR BISMARCK BANK"
12/09/70	The Fargo Forum	"RESTRAINING ORDER AGAINST BISMARCK BANK TURNED DOWN"
12/31/70	Morning Pioneer	"FIRST AMERICAN BANK TO APPEAR IN SUPREME COURT"
12/31/70	The Fargo Forum	"BISMARCK BANK ORDERED TO MAKE COURT APPEARANCE"
01/01/71	Bismarck Tribune	"FIRST AMERICAN TO DEFEND ITS POLICIES IN COURT"
01/09/71	Bismarck Tribune	"COURT CONSIDERS RESTRAINING ORDER ON FIRST AMERICAN"
01/14/71	Bismarck Tribune	"COURT DECLINES ORDER RESTRICTING FIRST AMERICAN"
02/15/71	Morning Pioneer	"COURT UPHOLDS SECURITIES CASE OF FIRST AMERICAN"
02/21/71	Bismarck Tribune	"FIRST AMERICAN FIGHTS SEIZURE"
02/23/71	Morning Pioneer	"STATE BANKING DEPARTMENT SEEKS TO TAKE OVER A BISMARCK BANK"
02/26/71	Bismarck Tribune	"COURT LEAVES FIRST AMERICAN FREE TO OPERATE"
03/03/71	Bismarck Tribune	"COURT SHUNS JURISDICTION IN FIRST AMERICAN CASE"
03/03/71	Morning Pioneer	"PRESIDENT SAYS BANK IS SOUND"
03/09/71	Morning Pioneer	"MENTAL RETARDATION, BANKING BOARD, PAROLE FUNDS OKAYED"
03/03/71	Bismarck Tribune	"FIRST AMERICAN FACES SEC SUIT"
03/10/71	Mpls. Tribune	"SEC ASKS N. D. BANK BE PUT UNDER RECEIVER"
03/10/71	Morning Pioneer	"SEC SEEKS RECEIVER FOR LOCAL BANK"
03/11/71	Morning Pioneer	"BANK PRESIDENT SAYS SEC CHARGES ARE 'WARMED OVER'"
03/11/71	The Fargo Forum	"HEAD OF BANK AT BISMARCK CHARGES COMPLAINT IS A 'WARMED OVER COPY'"

07/12/71	Bismarck Tribune	"FIRST AMERICAN PRESIDENT CALLS SEC CASE'A COPY'"
07/13/71	Bismarck Tribune	"JUDGE DISQUALIFIES SELF IN BANK CASE"
07/23/71	Morning Pioneer	"JUDGE ORDERS HALT TO SEC BANK SUIT"
07/23/71	Bismarck Tribune	"FARGO JUDGE ENDS FIRST AMERICAN RECEIVERSHIP BAN"
07/23/71	The Fargo Forum	"ORDER BARRING APPOINTMENT OF RECEIVER OVER BISMARCK BANK VACATED BY JUDGE"
07/24/71	Morning Pioneer	"BANK REQUESTS HIGH COURT TO ASSUME JURISDICTION OF CASE"
07/24/71	Morning Pioneer	"JUDGE NAMES AUDITOR TO STUDY BANK"
07/24/71	Bismarck Tribune	"COURT DECLINES FIRST AMERICAN CASE REQUEST"
07/25/71	Morning Pioneer	"SUPREME COURT DECLINES BANK CASE INVOLVEMENT"
07/26/71	Bismarck Tribune	"STATE PURSUES ACTION FORCING RECEIVERSHIP OF BANK AND TRUST FIRM"
07/27/71	Morning Pioneer	"STATE TO PRESS ACTION AGAINST BISMARCK BANK"
07/28/71	Bismarck Tribune	"BANK-TRUST FIRM EVICTS EXAMINERS"
07/29/71	Morning Pioneer	"BANK CONTROL CHANGES TWICE"
07/30/71	Morning Pioneer	"SCHEDULE BANK HEARING TODAY"
07/31/71	Morning Pioneer	"JUDGE RULES STATE'S ORDER AGAINST FIRST AMERICAN BANK WAS NOT VALID"
07/31/71	Bismarck Tribune	"ORDERS AGAINST FIRST AMERICAN RULED INVALID"
08/24/71	Bismarck Tribune	"BANKING BOARD APPEALS RULING"
08/25/71	Morning Pioneer	"APPEAL BANK CASE TO SUPREME COURT"
08/26/71	Morning Pioneer	"BANK OFFICIALS FILE CLAIMS AGAINST STATE BONDING FUND"
08/28/71	Bismarck Tribune	"$4.4 MILLION IN CLAIMS FILED AGAINST BOND FUND"
01/17/72	Bismarck Tribune	"FIRST AMERICAN SEIZURE ORDERED"
01/18/72	Morning Pioneer	"STATE SEIZES BANK PROPERTY"
01/18/72	The Fargo Forum	"BANK AGAIN ALLEGEDLY INSOLVENT"
01/18/72	Bismarck Tribune	"HEARING ON STAY IN FIRST AMERICAN CASE SET JAN. 25"
01/19/72	Bismarck Tribune	"FIRST AMERICAN SPOKESMAN SAYS FIRM IS SOLVENT"
01/19/72	Morning Pioneer	"SLATE TUESDAY BANK HEARING"

01/25/72	Bismarck Tribune	"FIRST AMERICAN HEARING RESLT"
01/26/72	Bismarck Tribune	"BANK BOARD'S ORDERS RULED NULL AND VOID"
02/09/72	Bismarck Tribune	"ARGUMENTS HEARD IN SEC MOTION FOR INJUNCTION"
02/10/72	Bismarck Tribune	"FIRST AMERICAN DEFENDS SYSTEM OF ACCOUNTING"
02/11/72	Bismarck Tribune	"FIRST AMERICAN ASSETS ARE QUESTIONED"
02/18/72	Bismarck Tribune	"FIRST AMERICAN ASKS PROBE ON BANK SECURITIES"
03/29/72	Bismarck Tribune	"FEDERAL JUDGE RULES IN FAVOR OF FIRST AMERICAN"
03/30/72	Morning Pioneer	"RULING FAVORS BISMARCK BANK"
04/05/72	Bismarck Tribune	"BANK DEPARTMENT APPEAL HEARD BY SUPREME COURT"
04/13/72	Bismarck Tribune	"FIRST AMERICAN BOOKS SEIZURE UPHELD"
04/14/72	Morning Pioneer	"BISMARCK BANK DECISION SAID DUE 'IN FEW DAYS'"
04/14/72	Bismarck Tribune	"RECEIVERSHIP DECISION AWAITS REVIEW OF REHEARING APPEAL"
05/19/72	Bismarck Tribune	"FIRST AMERICAN PETITION FOR REHEARING DENIED"
05/25/72	Bismarck Tribune	"SEC TO APPEAL DECISION FAVORING 'FIRST AMERICAN'"
06/09/72	Bismarck Tribune	"BANK EXAMINER TAKES CONTROL OF 1ST AMERICAN"
06/30/72	Bismarck Tribune	"STATE BANK BOARD ENDS HEARING IN FIRST AMERICAN BANK ACTION"
08/26/72	Bismarck Tribune	"FIRST AMERICAN SUES STATE BANKING BOARD"
08/26/72	Morning Pioneer	"FIRST AMERICAN DIRECTORS SUE BANKING COMMISSIONER"
09/13/72	Bismarck Tribune	"FIRST AMERICAN DEFICIT DISCLOSED IN HEARING BEFORE BANK BOARD"
09/14/72	Bismarck Tribune	"1ST AMERICAN OFFICIAL LINKED TO LOCAL HOTEL"
09/14/72	The Fargo Forum	"BISMARCK BANK SHOWING $227,000 CAPITAL DEFICIT"
09/15/72	Morning Pioneer	"CAPITAL DEFICIT SHOWS UP IN FIRST AMERICAN AUDIT"
11/20/72	Bismarck Tribune	"FIRST AMERICAL LOSES COURT BID"
12/12/72	Bismarck Tribune	"RECEIVER NAMED FOR 1ST AMERICAN"
12/12/72	Bismarck Tribune	"GEORGE ORDERED TO BEGIN 1ST AMERICAN LIQUIDATION"
12/13/72	Morning Pioneer	"BANK BANK RECEIVER"

12/13/72	Bismarck Tribune	"COURT BLOCKS 1ST AMERICAN RECEIVERSHIP"
12/14/72	Morning Pioneer	"BANK RECEIVER IS RESTRAINED"
12/15/72	Morning Pioneer	"FIRST AMERICAN WINS DECISION ON RECEIVER"
01/04/73	Bismarck Tribune	"1ST AMERICAN BUILDING BURNS"
01/04/73	Minot Daily News	"CLOSED BISMARCK BANK RAZED BY FIRE"
01/05/73	Bismarck Tribune	"FIRST AMERICAN RUIN ESTIMATED"
01/16/73	Bismarck Tribune	"NO DISCLOSURES AFTER BRIEFING WITH LINK ON FIRST AMERICAN"
03/27/73	Bismarck Tribune	"JUDGE GIVES ORDER IN LOCAL BANK CASE"
03/28/73	Morning Pioneer	"ASKS NEW BRIEFS IN BANKING CASE"
05/19/73	Bismarck Tribune	"FIRST AMERICAN DISPUTE HURTING AGENCY MORALE"
05/20/73	The Fargo Forum	"LEGAL COST SKYROCKETING IN COURT DUEL WITH BANK"
05/22/73	Morning Pioneer	"FIRST AMERICAN CALLS COMMITTEE UNFAIR"
05/22/73	Bismarck Tribune	"BUDGET UNIT 'UNFAIR' SAYS 1ST AMERICAN"
05/23/73	Bismarck Tribune	"BUDGET PANEL NOT OBJECT OF STATEMENT"
06/29/73	Bismarck Tribune	"APPEALS COURT ACTS ON FIRST AMERICAN"
07/01/73	Mpls. Tribune	"COURT REVERSES PART OF DECISION"
08/28/73	Bismarck Tribune	"COURT: FAIR HEARING DENIED FIRST AMERICAN"
08/29/73	Morning Pioneer	"JUDGE RULES FIRST AMERICAN DIDN'T RECEIVE FAIR TREATMENT"
08/29/73	The Fargo Forum	"FIRST AMERICAN DID NOT RECEIVE FAIR TREATMENT"
08/30/73	Bismarck Tribune	"JUDGE QUESTIONS BANKING BOARD'S CONSTITUTIONALITY"
08/31/73	Morning Pioneer	"JUDGE HITS BANK BOARD FOR 'INTEREST AND BIAS'"
10/03/73	Bismarck Tribune	"FIRST AMERICAN CHANGES OK'D"
11/27/73	Bismarck Tribune	"1ST AMERICAN CASE ORAL ARGUMENTS SET"
12/10/73	Bismarck Tribune	"STATE HIGH COURT HEARS 1ST AMERICAN ARGUMENTS"
12/11/73	Bismarck Tribune	"1ST AMERICAN CLAIMS STATE CONSPIRACY"
12/12/73	Morning Pioneer	"BANK'S LAWYERS ARGUE CONSPIRACY"
03/23/74	Morning Pioneer	"STATE BANK BOARD TOLD TO COMPLY WITH LAW"
06/29/74	Bismarck Tribune	"COURT RULES FIRST AMERICAN IS INSOLVENT"
06/29/74	Morning Pioneer	"COURT UPHOLDS BANKING BOARD"
07/01/74	Bismarck Tribune	"FIRST AMERICAN PLANS REQUEST"
07/16/74	Bismarck Tribune	"1ST AMERICAN PETITIONS FOR REHEARING"
08/01/74	Bismarck Tribune	"1ST AMERICAN DENIED REHEARING ON RULING"
08/02/74	Bismarck Tribune	"1ST AMERICAN TO APPEAL TO U. S. COURT"

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

IN DISTRICT COURT
FOURTH JUDICIAL DISTRICT

(Civil No. 21143)

STATE EX REL Donald R. Holloway, Securities Commissioner and Gilbert W. Ellwein State Examiner of the State of North Dakota,

Plaintiffs

vs.

FIRST AMERICAN BANK & TRUST COMPANY, a Domestic Corporation, and Robert M. Hart a/k/a R. M. Hart, Harvey W. Boen, Albert W. Fetzer, Ruth M. Hart, Arne J. Springan, John F. Sullivan and Charles L. Welch,

Defendants

Order

The Plaintiff has commenced the above entitled action against the Defendants, and in conjunction therewith obtained a Temporary Restraining Order and made application for a Temporary Injunction to restrain Defendants from continuing certain alleged fraudulent and illegal practices in the conduct of the defendant Bank and Trust Company.

The Plaintiffs Order to Show Cause on the Temporary Injunction dated August 26, 1970, was returnable before the Honorable Ray R. Friederich, one of the Judges of the Second Judicial District, on September 2, 1970. Subsequently, the Honorable Roy K. Redetzke was designated by the Supreme Court to hear and determine all further proceedings herein.

The Defendants made and filed their Return to the Order to Show Cause and Temporary Restraining Order together with their Motion to Dissolve and Vacate the Temporary Restraining Order.

The Order to Show Cause, Return and Motion came on for hearing before the Court on September 28, 1970 at 2:00 o'clock P. M. in the Courtrooms of the Cass County Courthouse in Fargo, North Dakota.

The Court has now considered Plaintiff's verified complaint and Defendants' Return together with all of the Exhibits and Affidavits submitted by the parties and in addition thereto the Court has considered oral arguments presented, the briefs, and all the files and records herein and now makes its Order as follows:

The Petition of the Plaintiffs for a temporary injunction for the reasons set out in its complaint and in the Order to Show Cause is hereby denied and the provisions of the Temporary Restraining Order contained in the Order dated August 28, 1970, be and the same are hereby vacated and annulled upon the following grounds for the following reasons:

1. The powers of defendants, as an annuity, safe deposit, surety and trust company are specifically prescribed by the laws of the State of North Dakota in 6-05 N.D.C.C.
2. Under the laws of the State of North Dakota, the Defendants are exempt from requirements of registration and approval of securities issued by the defendant bank and as dealers thereof;
3. The provisions of law governing the procedures and powers of defendants excludes other statutory requirements of prior approval for the issuance of Capital Notes;

4. Defendants have not violated the usury laws of the State of North Dakota;

5. Defendants procedure for compensation to itself for its performance of its trust duties as a Trust Company is legal and proper and said compensation may not be considered as "Interest" under the statutes of this State;

6. Defendants' "Certificates of Investment and Trust Certificates are not "Deposits" within the meaning of Section 6-03-63 N.D.C.C., said Certificates of Investment and Trust Certificates are, rather, Contracts with rates of interest in the statutory rate for such transactions;

7. The defendants are presently limited by law on the investments it may make;

8. The Plaintiffs' claim of Defendants refusal to submit reports on the Defendant Bank's condition as required by statute is without merit in that any failure to submit reports has been caused by the Plaintiff Examiner's Order of May 20, 1970. This Court has found that there is no fraudulent practice or violation of law in Defendants issuance of its Capital Notes and its Certificates of Investment;

9. Defendants have not been guilty of fraudulent practices as alleged by plaintiffs in its verified complaint and supporting affidavits and exhibits;

10. Plaintiffs are not entitled to an injunction against the defendants.

Dated this 23 day of December, 1970.

BY THE COURT:

/s/ Roy K. Redetzke
Roy K. Redetzke
District Judge.

June 15, 1971

Mr. Donald J. Stocking
United States Securities and Exchange Commission
7224 Federal Building
1961 Stout Street
Denver, Colorado 80202

RE: First American Bank and Trust Co. et al.

SUBJECT COMPANY: The company is incorporated under a specific chapter of the North Dakota Century Code, Chapter 6-05, permitting the creation of annuity, deposit, surety and trust companies. Essentially, the First American Bank and Trust Company is the only institution of its type in North Dakota. It does not carry either Federal Deposit Insurance Corporation coverage nor any other form of deposit insurance. Under Chapter 6-05 of the N.D.C.C., the trust company is under the supervision of the State Bank Examiner.

The principal officers of the corporation are as follows:

President	Robert M. Hart, Bismarck
First Vice-President	John F. Sullivan, Mandan
Vice-President	Robert N. Campbell
Assistant Secretary	Larry Sanders
Directors	Bernard H. Hilliard
	Jerry D. Pritchett
	Arne J. Springan
	Charles L. Welch
	Ruth M. Hart
	Albert W. Fetzer
	Harvey W. Boen

AFFILIATES: Bismarck Investment Corporation, a North Dakota holding company is listed as the controlling stockholder of First American Bank and Trust Company with 51.1% of the outstanding issued shares. Robert M. Hart is the president of Bismarck Investment Corporation and is listed as the sole stockholder of said corporation with ten shares. The annual report for Bismarck Investment Corporation filed with the North Dakota Secretary of State lists the following persons as the officers and directors of the corporation: R. M. Hart, President; Edna M. Hart, Vice-President; and Sandra L. Pritchett, Secretary.

Another affiliate corporation is Standard Investment Company, Inc., a North Dakota corporation. According to its annual report filed with the North Dakota Secretary of State on May 20, 1970 the officers and directors are listed as follows: R. M. Hart, President; Ruth M. Hart, Vice-President; Jerry D. Pritchett, Secretary. However, Articles of Amendent to the Articles of Incorporation of Standard Investment Company, Inc. were filed with the North Dakota Secretary of State on April 8, 1971 and Ralph A. Winn is listed as President and Nancy J. Hart is listed as secretary. The annual report and the Articles of Amendment indicate that there are 1,000 shares issued and outstanding in Standard Investment Company, Inc. The Examination of First American of November 12, 1970 indicates that a lease has been executed between First American Bank and Trust Company and Standard Investment Company with unpaid rentals amounting to $8,850.00.

Additional affiliates include Hart Agency Inc., an insurance agency owned by R. M. Hart and his family, and Hart Agency Realtors, a real estate agency owned and controlled by the R. M. Hart family.

GENERAL BACKGROUND AND EXHIBITS: The following is an outline of the proceedings had in this matter

on the state level together with an introduction generally to the exhibits enclosed under separate cover. On April 23, 1970 the Department of Banking and Financial Institutions under the signature of G. W. Ellwein, commissioner, issued a Cease and Desist order against the subject bank requiring them to stop the issuance and sale of capital notes and requiring that each purchaser be given written notice of the opportunity to rescend their purchase. (Exhibit 1) On May 20, 1970 the Department of Banking and Financial Institutions issued an additional Order requiring the subject bank to refrain from including in its statements, prospectus, notice, report or other publication the capital notes issued by the subject bank as part of its capital structure so as to enhance its financial status of the said bank. (Exhibit 2)

Thereafter in a civil action filed in the District Court for the State of North Dakota, in and for Burleigh County, the Fourth Judicial District, the State Securities Commissioner and the State Bank Examiner brought an injunctive action against the subject bank and the board of directors and officers for the purpose of restraining them from selling or offering to sell or advertising for sale, notes or debentures entitled certificates of investment or passbook investment accounts until the same had been approved by the State Examiner or until the subject bank had registered as a securities dealer pursuant to the North Dakota Securities Act of 1951; from refusing to submit reports of condition on subject bank to the said State Bank Examiner; from including in any book, prospectus, notice, report or statement or any other publication the capital notes issued by subject bank as part of its capital structure; and restraining subject bank from using the proceeds from the sale of guaranteed certificates of investment for the purchase of any other security except United States government securities; and restraining them from engaging in

fraudulent practices prohibited by Section 10-04-15, Subdivision 3 of the N.D.C.C. (North Dakota Securities Act of 1951). (Exhibit 3). We are also including the return to the order to show cause and the petition to dissolve the temporary restraining order filed by Frederick E. Saefke, Jr., attorney for the defendant subject bank. (Exhibit 4).

The District Court, Judge Roy K. Redetzke, presiding, denied the plaintiff's motion for a temporary injunction in the above referenced matter. The order was appealed to the Supreme Court and by opinion dated March 31, 1971, the Supreme Court reversed the District Court, reinstated the temporary restraining order, and held that the subject bank was required to register as a dealer of security under the North Dakota Securities Act even though the securities issued by the bank were not subject to registration with the securities commissioner. The court additionally held that the State Bank Examiner has the authority to review all securities issued by the subject bank. A copy of the Supreme Court opinion is included as Exhibit 5.

We are enclosing as Exhibit 6 a collection of correspondence and miscellaneous matter contained in the files of the State Examiner relative to the subject bank. The correspondence deals with the continuing refusal of the subject bank to submit to the authority of the State Examiner relative to the issuance of the capital notes, certificates of investment, trust receipts and various other securities.

Exhibit 7 in these papers is the history of the charter or Articles of Incorporation of the subject bank up to and including the most recent amendment in October of 1969. We are also enclosing the most recent annual reports for Standard Investment Company and Bismarck Investment Company as Exhibit 7 (a).

The form of Certificate of Investment issued by the subject bank is included in item Exhibit 8. The form of passbook investment accounts are reflected in Exhibit No. 9. Exhibits 10 and 11 are copies of the Reports of Examination by the State Bank Examiner for May 18, 1970 and for November 12, 1970. The most recent six month audit is now being completed and hopefully will be ready for review within the week.

For an explanation of the method utilized by the subject bank in the issuance of the capital notes, the trust certificates and the amended trust certificates we direct your attention to Exhibits 1 and 2 heretofore referred to. Please examine the method utilized in regard to the Magdelina Wolfe situation and the manner in which the subject bank maintained an account in the amount of $18,400.00 on its books even though the depositor had withdrawn the funds. We would point out that the Magdeline Wolfe promissory note is reflected on the November 12, 1970 examination as an outstanding collectible item.

COALVILLE INCIDENT: On October 6 and 7, 1970 we took the deposition of Robert M. Hart in a companion case and as part of that deposition we subpoenaed the records of Bismarck Investment Corporation and Robert M. Hart dealing with the Coalville Bank. We are including copies of Exhibits 1 through 112 and 118 through 123 relative to this matter. These exhibits contain letters and other memoranda by and between the Bismarck Investment Corporation, R. M. Hart, Bobby Henderson, Morton Weinman, First National Bank of Coalville Utah, Mr. Robert Williams, Standard Investment Company, Consolidated Underwriters, Inc., The FDIC, and various other agencies. Included also is a purportedly current stockholders list and the list of the officers and agents of First American Bank and Trust Company.

RECENT DEVELOPMENTS: We believe that you have a copy of the most recent brochure published by the subject bank and titled "Questions and Answers". This particular brochure contains various misrepresentations and fraudulent omissions in the sale of certificates of deposits. Paragraphs 4 and 5 of the brochure are misleading and fraudulent in that they represent that the deposits of the subject bank are insured. In fact, the subject bank carries no deposit insurance. Rather, the deposits are safeguarded simply by $300,000.00 deposit with the Secretary of State in accordance with statute. In addition it carries a $500,000.00 bankers indemnity bond with United States Fidelity and Guaranty Company. We have letters in our file, copies of which are included as Exhibits 12 and 13, in which misleading statements are made by the officers of the bank to inquiring depositors as to the extent of the insurance carried by the subject bank. In addition, Paragraph 5 would seem to indicate that the Bank is in compliance with the orders of the State Bank Examiner, when in fact they are: (1) refusing to publish their statement of condition and have done so since May 20 of 1970; (2) they are presently subject to a temporary restraining order in an action brought by the state bank examiner; and (3) the Reports of Examination indicate that the lending and leasing policies of the subject bank are not in accordance with accepted banking practices. These are only a few of the misrepresentations made in the brochure.

The most recent examination conducted by the State Bank Examiners Office in connection with the six month periodic audit revealed that there are a substantial number of leases executed by First American Bank and Trust Company to the principle officers, stockholders and relatives of the same. We might also add that there are leases of record to the affiliates, namely: Standard Invest-

ment Company, Bismarck Investment Corporation and Hart Agency, Inc. Most recently, we were notified that First American Bank and Trust had executed a lease of a franchise to the son of Mr. Robert M. Hart. This lease involves a Water-Boy franchise in Minot, North Dakota. Additional verification of these lease transactions will be forthcoming upon the completion of the audit.

Audit verification has also disclosed that it is impossible to verify the Bank's ownership to the several house-trailers leased and carried as assets. Specifically, the State Bank Examiners office has been unable to locate certificates of title or other evidence of ownership held by the subject Bank.

Most recently on about June 1, 1971 the State Bank Examiners office was informed that First American Bank and Trust company financed the acquisition of a lease and all personal property involved in the operation of the Prince Hotel in Bismarck. We understand that the purchase price was $100,000.00 paid by the subject bank. The bank then turned around and leased the hotel and property to a corporation known as the New Prince Hotel Corporation for the sum of $159,000.00. The records indicate that the entire lease income was immediately accumulated on the books of the corporation as earned income.

The same method may have been used with regard to the purchase of a 44 passenger turbo-jet aircraft. Apparently, the subject bank disbursed $75,000.00 to Holiday Air Inc., for the purchase of the aircraft. Holiday Aire Inc. then executed a note to subject bank in the amount of $95,000.00. The Bank apparently obtained title to the aircraft and then leased it back to Holiday Air, Inc., for an undetermined amount. A vertification of these figures must await completion of the audit.

CONCLUSION: We realize that much of the information given in this memorandum is sketchy. We also realize that most of the items forwarded to you are not of recent occurrence. However, we would like to stress the fact that the activities outlined by the materials demonstrate a continuing course of conduct on the part of the subject bank and the principals involved. Specific instances we believe can be demonstrated by the most recent audit. The offices of the North Dakota Securities Commissioner and the State Bank Examiner are continuing their investigations and are continually uncovering new and extensive instances.

After you have had an opportunity to review the materials either Mr. Jestrab or myself or both of us will be willing to meet with you or members of your staff to answer any questions and assist the extent that we are able to in further investigation. Please call us at any time if we can be of any assistance to you.

Sincerely,

Bjella & Jestrab
John R. Gordon

JRG/as

MINUTES OF SPECIAL STATE BANKING BOARD MEETING HELD IN OFFICE OF COMMISSIONER DEPARTMENT OF BANKING AND FINANCIAL INSTITUTIONS

STATE CAPITOL
BISMARCK, NORTH DAKOTA

JUNE 28, 1971

Members Present:	G. W. Ellwein, Chairman
	Ralph L. Trom, Member
	W. S. Raymond, Member
	James H. Duncan, Member
	John Rouzie, Member (Unexpired term of E. A. Nachtwey)
	Robert E. Keim, Secretary
Member Absent:	Donald T. Nicklawsky, Member
Also Present:	Bank Examiner Vic Abraham
	Deputy Examiner Baldwin E. Mertz, CPA
	Deputy Examiner Paul Storsteen, CPA
	Donald Holloway, Securities Commissioner
	Frank Jestrab, Special Attorney General

Chairman Ellwein called meeting to order 10:15 A.M., June 28, 1971.

General discussion led by Jestrab concerned the examination of First American Bank & Trust Company, Bis-

marck, North Dakota, as of May 14, 1971. The report was reviewed in detail by the entire board, discussion led by Keim, Abraham, and Martz.

Moved by Duncan that the examination be approved as submitted, seconded by Trom. Unanimously approved.

Ellwein stated that he felt he would be derelict if, as a result of this examination, he did not take possession of First American Bank & Trust Company.

Trom moved, seconded by Raymond that the Examiner take possession immediately.

Trom moved, seconded by Rouzie that an Order be prepared along general outlines submitted, compliance of terms of said Order shall be the condition under which the State Examiner would release to the officers of First American Bank & Trust Company without the receiver and providing for a hearing before the board, and providing for the alternative appointment of a receiver in default by First American Bank & Trust Company, its officers and directors of compliance with the conditions. A copy of the proposed form of order is to be filed with, and made a part of the minutes of this meeting. Unanimously approved.

In other action it was decided that the next regular meeting of the State Banking Board would be held on July 30, 1971, at 10:00 A.M., instead of July 23, 1971, as previously determined.

Letter request of First Bank of Langdon, Langdon, North Dakota, dated June 25, 1971, for an extension beyond June 30, 1971, for establishing the Paying and Receiving Station at Nekoma was considered.

Moved by Raymond, seconded by Duncan that a 60 day extension be granted. Unanimously approved.

Being no further business, it was moved by Rouzie, seconded by Trom to adjourn. Unanimously approved, 1:15 P.M.

/s/ G. W. Ellwein
G. W. Ellwein, Chairman

/s/ Robert E. Keim
Robert E. Keim, Secretary

DEPARTMENT OF
BANKING AND FINANCIAL INSTITUTIONS
State Capitol
Bismarck, North Dakota 58501
Phone: 224-2253

G. W. Ellwein
Commissioner
224-2256

Robert E. Keim
Assistant Commissioner
224-2257

January 17, 1972

IN THE MATTER OF FIRST AMERICAN BANK & TRUST COMPANY, BISMARCK, NORTH DAKOTA,

REPORT OF EXAMINATION

Order

To: First American Bank & Trust Company, Robert M. Hart, Robert N. Campbell, Larry Sanders, Officers and Directors, Harvey W. Boen, Albert W. Fetzer, Ruth M. Hart, Bernard H. Hillyer, Arne J. Springan, John F. Sullivan, Charles L. Welch, Directors, and Frederick E. Saefke, Jr., 212 North Fourth Street, Bismarck, North Dakota, and Irvin Nodland, Professional Building, Bismarck, North Dakota, their attorneys.

The State Examiner of the State of North Dakota, acting by and through his duly appointed and authorized Deputy Examiners, Gary Hovdestad, CPA, Deputy Examiner, Victor Abraham, Bank Examiner-in-Charge, Manley Malmstad, Deputy Bank Examiner, Baldwin E. Martz, CPA, Deputy Examiner, Paul Storsteen, CPA, Deputy Examiner, and Robert E. Keim, Assistant Commissioner, having, pursuant to sections 6-01-09 and 6-05-28, North Dakota Century Code, examined said First American Bank & Trust Company as of the close of business, November 12, 1971, and the said examination having been closed as of January 6, 1972, and the said Report of Examination thereafter and on Monday, the 17th day of January, 1972, having been submitted to the State Banking Board and the State Banking Board having approved the said Report of Examination, copies of which have been heretofore served upon you, and from said Approved Report of Examination finds:

1.

That the capital impairment as set forth in the Report of Examination of May 14, 1971, was $29,752.56; that the said impairment is now a total of $94,742.74.

2.

That notwithstanding the fact that the actual cash market value of the assets of First American Bank & Trust Company, is insufficient to pay its liabilities, the said institution has with the knowledge of its officers, managers and agents, continued to accept and receive deposits.

3.

That nearly one-fifth (1/5th) of all loans and leases made by First American Bank & Trust Company have

been made without or on inadequate security to Robert M. Hart, President, his family or closed family corporations, owned or controlled directly or indirectly by President Hart or members of his family.

4.

That First American Bank & Trust Company has consistently failed to follow generally accepted accounting practices particularly with respect to the treatment of lease income and has overstated its income in a way calculated to mislead the public as well as depositors and creditors of said First American Bank & Trust Company.

5.

That First American Bank & Trust Company, by its officers, agents and directors, has consistently, by means of a false advertising brochure, mailed in the United States mails and made available in its banking establishment to its depositors and the public, falsely represented its status by referring to "guaranteed earnings" when there is no guarantor; by continuing to advertise an investment program when it is not a registered broker-dealer authorized to sell such investment program and trust certificates in violation of Chapter 10-04, N.D.C.C.; by referring to four types of assessable shares of savings and loans associations; by innuendo suggesting that its deposits are insured in the manner that the deposits of nearly all other banks in North Dakota are insured.

6.

That First American Bank & Trust Company, has failed to file its periodic statements of condition as required by law and the Orders of the State Examiner dated April 23, 1970 and May 20, 1970, and served upon the Defendants and, from which no appeals were taken,

And it appearing to the State Banking Board that immediate action is required by the exigencies of the case to protect the public, and the depositors and creditors of First American Bank & Trust Company, it is therefore

ORDERED:

1. That First American Bank & Trust Company cease accepting deposits in any form whether as Certificates of Deposits, Passbook Savings, Certificates of Investment, Guaranteed Certificates of Investment, Passbook Investment Accounts, Trust Certificates, or otherwise, in any manner whatsoever;

2. That First American Bank & Trust Company cease disbursing funds for any reason whatsoever, including the purchase for renting, leasing, otherwise in using property whether real, personal or mixed, for any purpose whatsoever.

3. That First American Bank & Trust Company call for immediate payment all loans made to officers, directors or managers, their relatives, and family or closed corporations controlled directly or indirectly by the said officers or any members of their family or their nominees.

4. That First American Bank & Trust Company remove from office Robert M. Hart, Robert N. Campbell, Larry Sanders, and all present officers and directors and that new directors and officers acceptable to the State Banking Board be elected.

5. That First American Bank & Trust Company eliminate all doubtful and loss loans as set out in Report of Examination dated November 12, 1971, from its portfolio.

6. That First American Bank & Trust Company cease all advertising by means of brochures or otherwise of investment programs, participation or trust certificates, until the said First American Bank & Trust Company shall have qualified as a broker-dealer under the North Dakota statutes.

7. That First American Bank & Trust Company shall follow generally accepted accounting practices.

8. That First American Bank & Trust Company shall file statements of conditions as required by law and the Orders of the State Examiner.

9. That First American Bank & Trust Company shall cease and desist from all false and misleading advertising of what kind soever.

10. That First American Bank & Trust Company secure, provide and maintain immediately, new and unimpaired capital in the minimum amount of Four Hundred Thousand Dollars ($400,000.00).

11. That Robert M. Hart, his family and closed corporations, including Bismarck Investment Corporation, owned or controlled by Robert M. Hart, his family or nominees, divest themselves of all stock or contracts for the purchase or redemption of stock in First American Bank & Trust Company, or in the alternative place all said stock in a five year voting trust, the trustee of which must be satisfactory to the State Examiner.

OR, IN THE ALTERNATIVE, SHOW CAUSE before the State Banking Board at the office of the State Examiner in the State Capitol in Bismarck, North Dakota, on Thursday, the 20th day of January, 1972 at 9:00 A.M., or at such other time as may be allowed, why a Receiver

for First American Bank & Trust Company should not be appointed as provided by law.

Dated this 17th day of January, 1972, at Bismarck, North Dakota.

BY ORDER OF STATE BANKING BOARD

/s/ G. W. Ellwein
G. W. Ellwein, Chairman
State Banking Board
State Examiner and Commissioner

Affidavit

STATE OF NORTH DAKOTA)
) ss
COUNTY OF BURLEIGH)

I, G. W. Ellwein, having been duly sworn under oath, depose and say:

1. I am the duly appointed Commissioner of Banking and Financial Institutions and known as the State Examiner for the State of North Dakota and have been in my present position since October 1, 1969.

2. First American Bank & Trust Company (First American), with offices at Main and Third, Bismarck, North Dakota, is a "banking institution" as that term is defined by the North Dakota Century Code (NDCC) Section 6-01-02 (3) and by reason thereof is subject to supervision by the State Banking Board and State Bank Examiner.

3. Officers of First American are as follows: Robert M. Hart, president and senior trust officer; John F. Sulli-

van, first vice president and trust officer; Robert N. Campbell, vice president and trust officer; Larry Sanders, secretary and trust officer; Charles L. Welch, treasurer and trust officer.

4. Pursuant to Section 6-05-28 NDCC the State Examiner is required to make an examination of each trust company once in each six months. Such an examination of First American was made in May, 1970 and a report of examination was thereafter prepared and presented to management of First American on or about July 9, 1970. The report stated that the capital of the bank was impaired and that 21% of its loans were classified as substandard, doubtful or loss.

5. On August 21, 1970, the North Dakota Securities Commissioner, Donald R. Holloway, and I, in our official capacities and on behalf of the State of North Dakota, commenced an action in State District Court for the Fourth Judicial District seeking to enjoin First American, Robert M. Hart and certain then officers and directors of First American from continuing to violate certain provisions of the North Dakota banking and securities laws. The final disposition of this matter is still pending before that Court following a decision by the North Dakota Supreme Court on March 31, 1971, wherein a temporary restraining order was reinstated restraining the defendants from violating the securities dealer registration requirements of the North Dakota Securities Act (10-04-10 NDCC).

6. During the month of November, 1970, an examination of First American was conducted by my staff under my direction and a report of examination was prepared and subsequently presented to management of First American on or about December 31, 1970. The report states that capital continued to appear to be impaired with total

adverse classifications of accounts totaling $162,040.12, up nearly $60,000.00 from the examination in May, 1970. The report also reflects that 26.8% of the outstanding loans of the bank were classified as substandard, doubtful or loss. The report also indicates that First American had been and was continuing to fail to follow generally accepted accounting practices in reporting income from its lease contracts.

7. During the months of May and June, 1971, an examination of First American was made by my staff under my control and direction. A report of examination as of May 14, 1971, was prepared and presented to management on June 28, 1971. A copy of that report is attached hereto as Exhibit 1. The report reflects that First American is insolvent in a bankruptcy sense with assets of $3,057,583.55 and liabilities of $3,089,207.43. It further reflects that approximately 21% of First American's loans, lease contracts and lease equipment ($311,343.76) are with Robert M. Hart, his relatives or companies with which he is associated. The report further states that First American disregards generally accepted accounting principles with respect to stating its assets, income and losses.

8. It is my opinion, based on this report and further occurrences at First American since the examination date, that should First American be liquidated in its present condition depositors as a group would lose $300,000.00.

9. On June 28, 1971, an order was issued by the State Banking Board directing First American and its management to relinquish control over its assets to the State Examiner. A photocopy of that order is attached hereto as Exhibit 2.

10. The order directing First American to relinquish control of its books, records and other property to Mr.

Victor Abraham (Exhibits 3 & 4) was complied with by First American.

11. On June 30, 1971 at 3:50 P.M., I was served in my capacity as Commissioner of Banking and Financial Institutions with a copy of a Temporary Restraining Order (Exhibit 5).

12. On July 1, 1971 an application for a Writ of Prohibition was Filed with the North Dakota Supreme Court seeking an order to Vacate and Annul the Temporary Restraining Order issued on June 30, 1971 (Exhibit 6).

13. On July 2, 1971 the North Dakota Supreme Court refused to take jurisdiction of the application for the extraordinary relief sought (Exhibit 6a).

14. Attached hereto are Articles of Incorporation for First American Bank & Trust Company (Exhibit 7); Bismarck Investment Corporation (Exhibit 8); Hart Agency, Inc. (Exhibit 9) and Standard Investment Company, Inc. (Exhibit 10).

15. I have been unable to find that Hartwood Company is incorporated in the State of North Dakota or elsewhere, nor that it is a registered partnership in this State or elsewhere.

16. Certificates of deposit, certificates of investment and savings deposits issued by First American Bank & Trust Company and interest thereon are not insured by Federal Deposit Insurance Corporation nor by any other agency or instrumentality of the United States Government or the State of North Dakota nor by any insurance company. Certificates of deposit, certificates of investment and savings deposits issued by First American Bank & Trust Company and interest thereon are not guaranteed

by anyone other than First American Bank & Trust Company.

Further, affiant sayeth not.

/s/ G. W. Ellwein
G. W. Ellwein, Commissioner of
Banking and Financial Institutions
1301 State Capitol
Bismarck, North Dakota 58501

(Seal)

Subscribed and sworn to before me this 6th day of July, 1971.

/s/ E. A. Brostrom
Notary Public

My commission expires: June 29, 1973.

MINUTES OF SPECIAL STATE BANKING BOARD MEETING HELD IN OFFICE OF COMMISSIONER

DEPARTMENT OF BANKING AND FINANCIAL INSTITUTIONS

STATE CAPITOL
BISMARCK, NORTH DAKOTA

August 9, 1971

Members Present:	G. W. Ellwein, Chairman
	Ralph L. Trom, Member
	W. S. Raymond, Member
	Donald T. Nicklawsky, Member
	John Rouzie, Member
	Robert E. Keim, Secretary
Member Absent:	James H. Duncan, Member
Also Present:	Bank Examiner Vic Abraham
	Deputy Examiner Baldwin E. Martz, CPA
	Securities Commissioner Donald Holloway
	Special Attorney General Frank Jestrab

Chairman Ellwein called meeting to order at 10:05 A.M., August 9, 1971.

General discussion of matters concerning First American Bank & Trust Company, Bismarck, North Dakota, continued until 10:30 A.M. when the following people met with the Board: Attorney Fred Saefke, Attorney Irvin Nodland, CPA and Attorney Morris A. Tschider, Officers

and Board members Robert M. Hart, Robert N. Campbell, Larry Sanders, Mrs. Ruth M. Hart, Dr. Arne J. Springan, John F. Sullivan, Bernard H. Hillyer, A. W. Fetzer, and Harvey W. Boen, all of First American Bank & Trust Company. Discussion continued with Attorney Saefke relating concerns of First American Bank & Trust Company in the pending litigation. Meeting recessed at 11:50 A.M. with 2:30 P.M. set as next meeting of the board with personnel of First American Bank & Trust Company for decisions concerning propositions made during the morning session.

Board recessed at 12:00 noon until call of the Chairman.

Chairman Ellwein called meeting to order at 1:15 P.M., Member Duncan absent.

The minutes of the Regular State Banking Board meeting of July 30, 1971, were read, and upon motion by Nicklawsky, seconded by Raymond, were unanimously approved.

After discussion of the proposals and statements of the morning's meeting with members of First American Bank & Trust Company, it was moved by Trom, seconded by Rouzie that there is no basis to change our position, and the orders issued by the North Dakota State Banking Board are to remain in full force and effect. Motion carried unanimously.

Personnel of First American Bank & Trust Company to arrive at 2:30 P.M. as agreed were the following: Saefke, Nodland, Tschider, Hart, Campbell, Sanders, Fetzer, and Sullivan. Without further discussion Mr. Ellwein read the motion just referred to above concerning the orders of the State Banking Board. As there was no further

comment by any one present at the meeting, personnel of First American Bank & Trust Company were dismissed at 2:40 P.M.

Affidavit

STATE OF NORTH DAKOTA)
) SS
COUNTY OF BURLEIGH)

Earle H. Campbell, being first duly sworn on oath, deposes and says that he is of legal age, married, has a family and owns and resides in his home in Bismarck, North Dakota;

That he is employed by Agricultural Insurance Company as Service Office Manager, Western North Dakota; that he is not related to Robert N. Campbell, an officer of First American Bank & Trust Company, Bismarck, North Dakota;

That during the month of September, 1971, he was in the company of several fellow employees in the coffee room of Northwestern Savings & Loan Association, Fargo, North Dakota. Mr. Donald Nicklawsky and Mr. John M. Grove, both officers of Northwestern Savings & Loan Association, were seated at a table having a conversation;

That Mr. Nicklawsky asked Mr. Campbell how everything was going in Bismarck and how the bunch of crooks at First American Bank & Trust Company were getting along; he stated that Bob Hart and First American Bank & Trust Company were a bunch of crooks and that they were going to be put out of business;

That he was most surprised that a member of the State Banking Board would make a highly derogative statement about an institution under his jurisdiction.

Further affiant sayeth not.

Dated at Bismarck, North Dakota, this 26th day of June, 1972.

/s/ Earle H. Campbell
Earle H. Campbell

SUBSCRIBED and SWORN to before me this 26th day of June A.D. 1972.

/s/ Betty J. Ingham
Notary Public

My Commission Expires November 23, 1976.

MINUTES OF SPECIAL STATE BANKING BOARD MEETING HELD IN OFFICE OF COMMISSIONER

DEPARTMENT OF BANKING AND FINANCIAL INSTITUTIONS

STATE CAPITOL BISMARCK, NORTH DAKOTA

January 17, 1972

Members Present:	G. W. Ellwein, Chairman
	Ralph L. Trom, Member
	James H. Duncan, Member
	John Rouzie, Member
	Robert E. Keim, Secretary
Members Absent:	W. S. Raymond, Member
	Donald T. Nicklawsky, Member
Also Present:	Bank Examiner Vic Abraham
	Deputy Examiner Gary Hovdestad, CPA
	Special Attorney General Frank Jestrab
	Securities Commissioner Donald Holloway

Chairman Ellwein called meeting to order at 10:50 A.M., January 17, 1972.

Bank Examiner Abraham reviewed the report of examination of First American Bank & Trust Company, Bismarck, North Dakota, as of close of business November 12, 1971. Report was reviewed in detail by those present, discussion led by Abraham.

Member Nicklawsky arrived at 11:12 A.M. was briefed on what had been reviewed previously.

Moved by Rouzie that the examination be approved as submitted, seconded by Trom, approved.

Ellwein reviewed his appraisal of the report, stating he felt he should take immediate possession of First American Bank & Trust Company.

Duncan moved, seconded by Trom that the examiner take immediate possession.

Duncan moved, seconded by Trom that an Order be prepared along general outlines submitted, compliance of terms of said Order shall be the condition under which the State Examiner would release to the officers of First American Bank & Trust Company without the receiver and providing for a hearing before the board, and providing for the alternative appointment of a receiver in default by First American Bank & Trust Company, its officers and directors of compliance with the conditions. A copy of the proposed form of order is to be filed with, and made a part of the minutes of this meeting. Approved.

Being no further business, it was moved by Nicklawsky, seconded by Ellwein to adjourn. Approved at 12:05 P.M.

/s/ G. W. Ellwein
G. W. Ellwein, Chairman

/s/ Robert E. Keim
Robert E. Keim, Secretary

MINUTES OF SPECIAL STATE BANKING BOARD MEETING HELD IN OFFICE OF COMMISSIONER

DEPARTMENT OF BANKING AND FINANCIAL INSTITUTIONS

STATE CAPITOL
BISMARCK, NORTH DAKOTA

May 26, 1972

Members Present:	G. W. Ellwein, Chairman
	Ralph L. Trom, Member
	W. S. Raymond, Member
	John Rouzie, Member
	Robert E. Keim, Secretary
Members Absent:	James H. Duncan, Member
	Donald T. Nicklawsky, Member
Also Present:	Special Attorney General Frank Jestrab

Chairman Ellwein called meeting to order at 11:00 A.M., May 26, 1972, and a quorum was declared present.

A review of proceedings concerning First American Bank & Trust Company, Bismarck, North Dakota, was held. After consideration, the following resolution was presented, and upon motion by Rouzie, seconded by Trom, was unanimously approved:

RESOLUTION

"WHEREAS, the State Banking Board of the State of North Dakota duly assembled pursuant to proper notice met at a special meeting in the offices of the State Banking Department, Capitol Building, Bismarck, North Dakota,

on Friday the 26th day of May, 1972 at 11:00 o'clock in the forenoon of said day;

Present: G. W. Ellwein Chairman
Ralph L. Trom, Member
W. S. Raymond, Member
John Rouzie, Member
Robert E. Keim, Secretary

and

WHEREAS, the State Examiner reported that the Supreme Court of North Dakota had decided certain litigation involving First American Bank & Trust Company, Bismarck, North Dakota,

Now therefore, be it

RESOLVED that the action of this Board heretofore taken approving respectively the reports of examination of First American Bank & Trust Company as of May 14, 1971 and November 12, 1971, be in all respects ratified and confirmed, and be it further

RESOLVED that State Examiner be and hereby is directed to commence a proceeding before this Board to determine the solvency of the First American Bank & Trust Company and to include in said proceedings all other matters developed in the reports of examination of May 14, 1971 and November 12, 1971 respectively, and based upon the State Examiner's supervision, made as provided by law to the date of said hearing for trial on the merits before this Board, of First American Bank & Trust Company, and be it further

RESOLVED that notice, as required by law, of the hearing for trial on the merits be given by personal service

or certified mail of the said notice together with a copy of the complaint, and be it further

RESOLVED that the said State Examiner be and hereby is authorized and directed to do all things necessary to effectuate the matters hereinabove set forth."

STATE OF NORTH DAKOTA
STATE BANKING BOARD

In the Matter of First American Bank & Trust Company, Robert M. Hart, Robert N. Campbell, Larry Sanders, its Officers and Directors, Harvey W. Boen, Albert W. Fetzer, Ruth M. Hart, Bernard H. Hillyer, Arne J. Springan, John F. Sullivan, Charles L. Welch, its Directors,

Respondents.

Complaint

State Banking Board, acting upon its own initiative as Petitioner herein for its complaint against the respondents above named, alleges:

1.

That the State Examiner of the State of North Dakota, acting by and through his duly appointed authorized, qualified and acting, Deputy Examiners, did pursuant to Section 6-01-09 and 6-05-28 North Dakota Century Code, examine respondent, First American Bank & Trust Company, as of the close of business May 14, 1971. Said examination having been closed as of June 17, 1971, and that a report of said examination was duly prepared.

2.

That the Report of Examination aforesaid was thereafter and on the 28th day of June, 1971, presented to

the State Banking Board of the State of North Dakota, duly assembled upon proper notice at a special meeting called by the State Examiner, and was at such meeting by said Board, duly approved.

3.

That the State Examiner of the State of North Dakota, acting by and through his duly appointed authorized, qualified and acting, Deputy Examiners, did pursuant to Section 6-01-09 and 6-05-28 North Dakota Century Code, examine respondent, First American Bank & Trust Company, as of the close of business November 12, 1971; said examination having been closed as of January 6, 1972, and that a report of said examination was duly prepared.

4.

That the Report of Examination aforesaid was thereafter and on the 17th day of January, 1972, presented to the State Banking Board of the State of North Dakota, duly assembled upon proper notice at a special meeting called by the State Examiner, and was at such meeting by said Board, duly approved.

5.

That based upon the Report of Examination as of May 14, 1971, G. W. Ellwein, State Examiner, issued an order dated June 28, 1971, directing First American Bank & Trust Company to relinquish possession of its books, records, and other property to Victor Abraham, Deputy Examiner.

6.

That Respondents appealed to the District Court and the said order was held null and void.

7.

That based upon the Report of Examination as of November 12, 1971, G. W. Ellwein, State Examiner, issued an order dated January 17, 1972, directing First American Bank & Trust Company to relinquish possession of its books, records, and other property to Victor Abraham, Deputy Examiner.

8.

That Respondents thereupon appealed to the District Court and the said order was held null and void.

9.

That thereafter the Supreme Court of North Dakota did on April 12, 1972, issue its opinion reversing the judgment of the trial court and holding both the orders of June 28, 1971 and January 17, 1972 aforesaid valid and in full force and effect and holding further that said orders were to remain in full force and effect during the pendency of proceedings before the State Banking Board to determine the solvency of First American Bank & Trust Company.

10.

That thereafter judgment on remittitur was duly entered respectively on an appropriate order for judgment on remittitur in each of said appeals.

11.

That on the 26th day of May, 1972, the State Banking Board at a special meeting duly assembled upon proper notice did approve, ratify and confirm the action taken on June 28, 1971 and January 17, 1972, approving the said reports of examination before the State Banking Board

and did direct the commencement of a proceeding against the said First American Bank & Trust Company and including in said proceedings also other matters developed in the Reports of Examinations of May 14, 1971 and November 12, 1971 respectively.

12.

That the actual cash market value of the assets of First American Bank & Trust Company is insufficient to pay its liabilities.

13.

That the capital impairment as set forth in the Report of Examination of May 14, 1971, was $29,752.56; that the said impairment as of January 6, 1972, was $94,742.74.

14.

That notwithstanding the fact that the actual cash market value of the assets of First American Bank & Trust Company, is insufficient to pay its liabilities, the said institution has with the knowledge of its officers, managers and agents, continued to accept and receive deposits.

15.

That nearly one-fifth (1/5) of all loans and leases made by First American Bank & Trust Company have been made without or on inadequate security to Robert M. Hart, President, his family or closed family corporations, owned or controlled directly or indirectly by President Hart or members of his family.

16.

That First American Bank & Trust Company has consistently failed to follow generally accepted accounting

practices particularly with respect to the treatment of lease income and has overstated its income in a way calculated to mislead the public, as well as depositors and creditors of said First American Bank & Trust Company.

17.

That First American Bank & Trust Company, by its officers, agents and directors, has consistently, by means of a false advertising brochure, mailed in the United States mails and made available in its banking establishment to its depositors and the public, falsely represented its status by referring to "guaranteed earnings" when there is no guarantor; by continuing to advertise an investment program when it is not a registered broker-dealer authorized to sell such investment program and trust certificates in violation of Chapter 10-04 N.D.C.C.; by referring to four types of assessable shares of savings and loans associations; by innuendo suggesting that its deposits are insured in the manner that the deposits of nearly all other banks in North Dakota are insured.

18.

That First American Bank & Trust Company has failed to file its periodic statements of condition as required by law and the orders of the State Examiner dated April 23, 1970 and May 20, 1970, and served upon the Defendants and, from which no appeals were taken.

WHEREFORE, Petitioner prays for an Order:

1. That First American Bank & Trust Company cease accepting deposits in any form whether as Certificates of Deposits, Passbook Savings, Certificates of Investment, Guaranteed Certificates of Investment, Passbook Investment Accounts, Trust Certificates, or otherwise, in any manner whatsoever;

2. That First American Bank & Trust Company cease disbursing funds for any reason whatsoever, including the purchase for renting, leasing, otherwise in using property whether real, personal or mixed, for any purpose whatsoever.

3. That First American Bank & Trust Company call for immediate payment all loans made to officers, directors or managers, their relatives, and family or closed corporations controlled directly or indirectly by the said officers or any members of their family or their nominees.

4. That First American Bank & Trust Company remove from office Robert M. Hart, Robert N. Campbell, Larry Sanders, and all present officers and directors and that new directors and officers acceptable to the State Banking Board be elected.

5. That First American Bank & Trust Company eliminate all doubtful and loss loans as set out in Report of Examination dated November 12, 1971, from its portfolio.

6. That First American Bank & Trust Company cease all advertising by means of brochures or otherwise of investment programs, participation or trust certificates, until the said First American Bank & Trust Company shall have qualified as a broker-dealer under the North Dakota statutes.

7. That First American Bank & Trust Company shall follow generally accepted accounting practices.

8. That First American Bank & Trust Company shall file statements of conditions as required by law and the orders of the State Examiner.

9. That First American Bank & Trust Company shall cease and desist from all false and misleading advertising of what kind soever.

10. That First American Bank & Trust Company secure, provide, and maintain immediately, new and unimpaired capital in the minimum amount of Four Hundred Thousand Dollars ($400,000.00).

11. That Robert M. Hart, his family and closed corporations, including Bismarck Investment Corporation, owned or controlled by Robert M. Hart, his family or nominees, divest themselves of all stock or contracts for the purchase or redemption of stock in First American Bank & Trust Company, or in the alternative, place all said stock in a five year voting trust, the trustee of which must be satisfactory to the State Examiner.

Dated this 26th day of May, 1972.

Helgi Johanneson, Attorney General, Arley R. Bjella, Frank F. Jestrab, John R. Gordon, Special Assistant Attorneys General

By: /s/ Frank F. Jestrab
Frank F. Jestrab

Attorneys for Petitioner, State Banking Board
111 East Broadway
P.O. Box 1526
Williston, North Dakota 58801

STATE OF NORTH DAKOTA
STATE BANKING BOARD

In the Matter of First American Bank & Trust Company, Robert M. Hart, Robert N. Campbell, Larry Sanders, its officers and directors, Harvey W. Boen, Albert W. Fetzer, Ruth M. Hart, Bernard H. Hillyer, Arne J. Springan, John F. Sullivan, Charles L. Welch, its directors,

Respondents.

Special Appearance and Return

TO: THE STATE BANKING BOARD OF THE STATE OF NORTH DAKOTA, PETITIONER, AND HELGI JOHANNESON, ATTORNEY GENERAL, AND ARLEY R. BJELLA, FRANK F. JESTRAB, AND JOHN R. GORDON, SPECIAL ASSISTANT ATTORNEYS GENERAL, ITS ATTORNEYS:

Come now the Respondents in the above entitled action and make this special appearance and return to the Notice of Hearing and Complaint dated May 26, 1972, in the above entitled action.

I.

Respondents allege the Notice of Hearing fails to comply with the provisions for notice required by the North Dakota Administrative Procedures Act.

II.

Respondents allege the North Dakota State Banking Board, as presently constituted, is not a fair, impartial, unbiased tribunal and that the Respondents, accordingly, cannot receive a fair hearing before said tribunal as re-

quired by the Fifth and Fourteenth Amendments to the Constitution of the United States of America, and by the Constitution of the State of North Dakota.

III.

Deny each and everything contained in the Complaint except that which is hereinafter expressly admitted, qualified, or explained.

IV.

Deny the allegations of paragraph 1 of the complaint.

V.

Deny the allegations of paragraph 2 of the complaint.

VI.

Deny the allegations of paragraph 3 of the complaint.

VII.

Deny the allegations of paragraph 4 of the complaint.

VIII.

Admit the allegations of paragraph 5 of the complaint.

IX.

Admit the allegations of paragraph 6 of the complaint.

X.

Admit the allegations of paragraph 7 of the complaint.

XI.

Admit the allegations of paragraph 8 of the complaint.

XII.

Admit so much of paragraph 9 as alleges that the Supreme Court of North Dakota reversed the District Court with respect to certain orders of June 28, 1971, and January 17, 1972, but affirmatively allege that the allegations of paragraph 9 of the complaint are incomplete, and misleading, in that they fail to recite that the Supreme Court also sustained the District Court in respect to other orders of June 28, 1971, and January 17, 1972, on the grounds that said orders were illegal, unlawful, arbitrary, and void. Further allege that paragraph 9 of the complaint insofar as it expressly alleges that the North Dakota Supreme Court held "that said orders were to remain in full force and effect during the pendency of proceedings of the State Banking Board to determine the solvency of First American Bank & Trust Company" is false, misleading, and totally in error.

XIII.

Admit paragraph 10 of the complaint to the extent that the Judgment on Remittitur was entered subsequent to the Order for Judgment on Remittitur having been signed, but deny that such order was an appropriate order for judgment.

XIV.

Allege that Respondents are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 11 of the complaint and therefore deny the same and put the petitioner or plaintiff to their proof.

XV.

Deny the allegations contained in paragraph 12 of the complaint.

XVI.

Admit so much of paragraph 13 of the complaint only insofar as it purports to allege that the report of examination contains a statement of impairment, but affirmatively deny that any such capital impairment exists.

XVII.

Deny the allegations of paragraph 14 of the complaint.

XVIII.

Deny the allegations of paragraph 15 of the complaint.

XIX.

Deny the allegations of paragraph 16 of the complaint.

XX.

Deny the allegations of paragraph 17 of the complaint.

XXI.

Deny the allegations of paragraph 18 of the complaint and allege that said orders of April 23, 1970, and May 20, 1970, are null and void ab initio pursuant to the Supreme Court's opinions of April 12, 1972, and May 18, 1972, in cases numbered 21567 and 21797, wherein the Supreme Court of North Dakota held that the power and authority of the State Examiner does not include the right to issue orders of the procedure and substance followed on April 23, 1970, and May 20, 1970.

WHEREFORE, Respondents demand the following:

1. That the complaint of the petitioners be dismissed with prejudice and that Respondents be returned to possession and control of First American Bank & Trust Company.

2. That the individual members of the North Dakota State Banking Board recuse themselves and that a constitutional and lawful panel of board members be appointed, having no competitive, personal interest in the outcome of their own rules, regulations, and deliberations.

3. For such other relief as may be fair, just, and equitable in the circumstance.

Dated this 15th day of June, 1972.

/s/ Frederick E. Saefke Jr.
Frederick E. Saefke, Jr.
212 North Fourth Street
Bismarck, North Dakota 58501
Irvin B. Nodland
Thompson, Lundberg & Nodland
1025 North Third Street
Bismarck, North Dakota 58501
Attorneys for Respondents

Part of Banking Board Hearing Transcript

[1] (The hearing herein commenced in Rooms G-5 and 6 of the State Capitol Building, Bismarck, North Dakota, on Monday, June 19, 1972, as follows, there being present the members of the Banking Board, with the exception of Mr. Duncan:)

THE EXAMINER: This hearing will open.

This hearing has been called at the order of the State Banking Board In the Matter of First American Bank & Trust Company, Robert M. Hart, Robert N. Campbell, Larry Sanders, its Officers and Directors, Harvey W. Boen, Albert W. Fetzer, Ruth M. Hart, Bernard H. Hillyer, Arne J. Springan, John F. Sullivan, Charles L. Welch, its Directors.

Now, to the Respondents above named and Frederick E. Saefke, Jr., Dakota National Bank Building, Post Office Box 1874, Bismarck, North Dakota, 58501, and Irvin B. Nodland, Professional Building, Bismarck, North Dakota, 58501 their attorneys.

SIRS:

PLEASE TAKE NOTICE that there has been filed with the State Banking Board, a complaint, a copy of which is annexed hereto and made a part hereof, and that the same will come on for hearing for trial on the merits before the State Banking Board on Monday, the 19th day of June, 1972, at 10:00 o'clock a.m. in the forenoon of said [2] day or as soon thereafter as counsel can be heard, in the offices of the said Board, Capitol Building, Bismarck, North Dakota. Unless an answer to the complaint is served upon the Petitioner, the State Banking Board aforesaid, at least three (3) days before the time specified for hearing herein, the complaint shall be deemed admitted and the State Banking Board will enter such order as the facts and law may warrant.

A copy of this notice will be served upon the respondents personally on or before the 30th day of May, 1972.

Dated this 26th day of May, 1972.

Helgi Johanneson, Attorney General,
Arley R. Bjella, Frank F. Jestrab,
John R. Gordon, Special Assistant
Attorneys General

By: /s/ Frank F. Jestrab
Frank F. Jestrab
Attorneys for Petitioner, State
Banking Board
111 East Broadway-P.O. Box 1526
Williston, North Dakota 58801

I would like to at this time introduce the Board members: Mr. John Rouzie, President, First National Bank of Bowman. Mr. Ralph Trom, President of the Kindred State Bank, Kindred, North Dakota. Mr. Don Nicklawsky, Vice President, Northwestern Savings & Loan Association, Fargo, North Dakota. Mr. W. S. Raymond, [3] President, Citizens State Bank of Ray, North Dakota. And I am chairing, and a member of the Board as State Examiner, Commissioner of Banking Institutions, State of North Dakota.

Will the parties state their appearances, please?

MR. JESTRAB: Frank Jestrab, Special Assistant Attorney General, 111 East Broadway, Williston, North Dakota, appearing for the State Banking Board.

MR. SAEFKE: Frederick E. Saefke, Jr., and Irvin Nodland, lawyers of Bismarck, North Dakota, appearing for and representing the First American Bank & Trust Company and the officers and directors named.

THE EXAMINER: Any other appearances? Now, all evidence will be received subject to any objections.

Are you ready to proceed, gentlemen?

MR. JESTRAB: Plaintiff is ready—or the Board's ready.

MR. SAEFKE: We would ask, Mr. Chairman, that the Board recognize that the Respondents or Defendants are making a special appearance this morning and that we have asked this Board, in view of its previous findings, affidavits, public releases, correspondence concerning these people, that it dissolve itself until a new board is appointed by which these people may have a fair and unbiased hearing according to due process of law and under [4] the equal protection of the laws.

MR. JESTRAB: We're ready to proceed then, Your Honor.

THE EXAMINER: You may begin, Mr. Jestrab.

MR. JESTRAB: Could I have my Complaint?

MR. SAEFKE: May we have the record show that the Chairman apparently has denied our request, and make a special appearance, and that we are going to proceed with the Board as presently constituted?

THE EXAMINER: I would want to mention one thing: That we do have a quorum. We are awaiting one more Board member—Mr. James Duncan. He's President of the Bank at Neche. Presently—the last word we got, he was down, due to weather, in Carrington. But he is going to make all efforts to be here. But, nevertheless, the Board will proceed. We do have a quorum.

MR. SAEFKE: And on the further ground, Mr. Chairman, from the statements of the Chairman, it is evident now in the record that these people do not have a representative on this Board; that the members of the Board are adversaries in business, that they are defendants in lawsuits between the parties, that there have been filed and as a matter of record under the affidavits of the Chairman, prejudgments in this matter, purportedly by the Chairman and by the Board, which prejudgments and [5] the manner in which they have been conducted, have been declared unlawful by the Supreme Court of North Dakota.

THE EXAMINER: Mr. Jestrab—

MR. SAEFKE: Could we have a ruling from the Chair on that motion, so that we will have it in the record, please?

(Petitioner's Exhibits 1 and 2 were marked for identification by the Reporter.)

MR. SAEFKE: Do you deny our motion to dissolve this Board until a new board is appointed?

THE EXAMINER: That's correct.

MR. SAEFKE: All right.

MR. JESTRAB: We offer in evidence Petitioner's Exhibit 1, which is a copy of the Report of Examination of First American Bank & Trust Company, Bismarck, Burleigh County, North Dakota, examined as of the close of business May 14th, 1971, and closed at 3:30 P.M., on June 17th, 1971. We're offering a copy, Mr. Saefke. If you want the originals, we can get them; but we'd like to keep the originals in the file.

MR. SAEFKE: We're not interested in the originals, but we do object to the Petitioner's Exhibit 1 as being without foundation.

THE EXAMINER: Objection denied.

MR. SAEFKE: We further object to it on the [6] grounds that it is signed by a number of persons and necessarily contains comments, conclusions and speculations by those persons, which is not in evidence before this Board before the receipt of this Petitioner's Exhibit.

THE EXAMINER: Objection denied.

MR. JESTRAB: The—

MR. SAEFKE: May I add one further objection while we have a moment here?

On the further ground that one of the signatories to the Exhibit, if he participated in the examination to which he has signed his name, was as a Deputy Examiner in violation of a State law in which he was a director and a shareholder of a national bank and trust company when he participated in the examination of this Trust Company; to-wit, Mr. Baldwin E. Martz and his two part-

ners, Mr. Hovdestad and Mr. Storsteen, who would then be indirectly concerned.

THE EXAMINER: Objection denied.

MR. JESTRAB: Now, Mr. Saefke, as I understand, you have no objections to the fact that the Exhibit is a copy.

MR. SAEFKE: No.

MR. JESTRAB: The Complainants offer Exhibit 2, which is a Report of Examination of First American Bank & [7] Trust Company of Bismarck, Burleigh County, North Dakota, examined as of the close of business November 12th, 1971, closed at 2:30 P.M., on January 6, 1972.

MR. SAEFKE: To which we object on the grounds of no foundation, number one. May we have a ruling on that?

THE EXAMINER: Would you quote that again, please?

MR. JESTRAB: I'm not sure, Mr. Saefke. You talk about a foundation. Now, you're not complaining about the fact that it is a copy?

MR. SAEFKE: No.

MR. JESTRAB: Okay.

MR. SAEFKE: We object on the ground there's no foundation to offer this Exhibit in evidence.

THE EXAMINER: Objection denied.

MR. SAEFKE: All right. We further object on the grounds that it necessarily contains conclusions, comments, speculations and hearsay when it appears that it is signed by one, two, three, four, five, six different persons.

THE EXAMINER: Objection denied.

MR. SAEFKE And another objection is that three of the persons whose names appear hereon, to-wit, Baldwin E. Martz, as a Deputy Examiner, Paul Storsteen, as a Deputy Examiner, and Gary Hovdestad, as a Deputy Examiner, [8] were, at the time of the purported examination and purportedly participating in said examination from having signed the examination, were partners in a business of accounting as Certified Public Accountants in the City of Minot, North Dakota; that at such time Mr. Baldwin E. Martz was a stockholder and director of the First National Bank and Trust Company of Minot, which Trust Division of said Bank was within the jurisdiction of the State Examiner's office, and for that reason, the report is null and void.

THE EXAMINER: Objection denied.

MR. JESTRAB: And, Mr. Examiner, we would like the Board at this time to take notice of its own records and note that the Examination, Exhibit 1, was presented to the State Banking Board of the State of North Dakota duly assembled and upon proper notice at a special meeting called by the State Examiner and was at such meeting by said Board duly approved, and I'm speaking now of Exhibit 1; that we would likewise request at this time that the Board take notice—judicial notice—of its own records that the Report of Examination being Exhibit 2 was on the 17th day of January, 1972, presented to the State Banking Board duly assembled upon proper notice at a special meeting called by the State Examiner and was at such meeting by said Board duly approved.

[9] We would likewise request, Mr. Examiner, that the Board take judicial notice of the Order issued by the State Examiner on June 28th, 1971 directing First American Bank & Trust Company to relinquish its books, records and other property to Victor Abraham, Deputy Examiner.

We'd like, also, and request at this time that, based upon a Report of Examination as of November 12th, 1971, being Exhibit 2 in evidence, that the State Examiner issued an Order dated January 17th, 1972 directing First American Bank & Trust Company to relinquish possession of its books, records and other property to Victor Abraham, Deputy Examiner.

MR. SAEFKE: I think, before the record gets too long on these requests that you take such notice, we enter an objection to each request on the Report of Examination which is Exhibit No. 1 and on the Report of Examination marked Exhibit No. 2 and on the Order of June 28th and on the Order of January 17, 1972.

THE EXAMINER: Well, you did make objections, didn't you, on Exhibit No. 1 and Exhibit No. 2 as to the examinations? Now you are making objections to what?

MR. SAEFKE: The request of your Counsel that you take notice of your own records, of which we have no knowledge, and we object. We don't know whether you have [10] any records, whether you took any action, or anything else, and we object to you taking notice of any such records. No showing that they exist.

THE EXAMINER: Objection de—

MR. JESTRAB: We—

MR. SAEFKE: Objection what?

MR. JESTRAB: Go ahead.

THE EXAMINER: Objection denied.

MR. JESTRAB: We will also ask leave to introduce certified extract copies of the Minutes of the Board in each case to supplement the record with respect to the orders of which we have just asked the Board to take judicial notice.

MR. SAEFKE: To which we would object, unless they're presented for our scrutiny before they're offered.

MR. JESTRAB: We will do that, Mr. Saefke, as we do all other exhibits, and we'll give you an opportunity to examine them

STATE OF NORTH DAKOTA)
) SS
COUNTY OF BURLEIGH)

IN DISTRICT COURT
FOURTH JUDICIAL DISTRICT

Civil No. 22281

First American Bank & Trust Company, a domestic corporation, Robert M. Hart, Robert N. Campbell, Larry Sanders, Harvey W. Boen, Albert W. Fetzer, Ruth M. Hart, Bernard H. Hillyer, Arne J. Springan, John F. Sullivan, Charles L. Welch,

Appellants,

vs.

G. W. Ellwein, State Examiner and Commissioner Department of Banking and Financial Institutions; the State Banking Board and Victor Abraham, Bank Examiner, all of the State of North Dakota,

Appellees.

Memorandum Opinion and Decision

The parties hereto have been in and out of the courts numerous times since 1970. No less than five North Dakota

District Judges have been separately involved at one time or another. Our Supreme Court has been drawn into the fray on at least two facets of this seemingly never-ending struggle. On occasion the parties hereto have sought to invoke the power of the federal court system.

The issue here is whether or not the First American Bank & Trust Company (hereinafter designated FAB) should be allowed to continue doing business within the State of North Dakota.

On June 19, 1972 an administrative hearing was begun before the State Banking Board, continuing through June 29th, resuming again September 13th and 14th. From such hearing 1248 pages of transcript resulted. The appellants herein specially appeared, having objected to the Board's jurisdiction to act by reason of its previously demonstrated bias and interest. On December 12, 1972 the Board issued its Findings of Fact, Conclusions of Law, and ordered a receiver appointed to take charge of liquidating the appellants' affairs. An appeal was instigated and this Court, by Order dated December 14, 1972, stayed the Board's order made two days earlier.

On February 22, 1973 appellants brought a motion before this Court to permanently enjoin the State Banking Board by reason of its bias or, in the alternative, to have the case remanded to the Board for the purpose of receiving certain exhibits. This motion was resisted by the appellee, and the Court denied by order dated February 27, 1973. Subsequently, on March 8, 1973, the appellants herein filed notice of appeal to the Supreme Court from this Court's order of denial dated February 27, 1973. On March 27, 1973 an original and four copies of the transcript on appeal was delivered by the Court Reporter to Mr. Saefke, one of the appellants' attorneys.

Next, the appellees, by notice of motion dated March 8, 1973, moved to dismiss the appellants' appeal taken to this Court on December 13, 1972. Appellants countermotioned asking again to have the Court remand the case to the State Banking Board and staying this appeal pending action by the Supreme Court on the appeal taken by the notice dated March 8, 1973. Motion and countermotion were heard and both denied by this Court on March 27, 1973, the Court's order reflecting this action was signed on March 30, 1973.

The appellants herein have seen fit to present this initial brief in two parts designated "First brief" and "Second Brief." The so-called "First Brief" deals with the same question which they raised by motion heard and denied by this Court on February 22, 1973. They appealed such denial and it is the appellees' position that such action on their part effectively removed the question from this Court's consideration; that the appeal divested jurisdiction here and placed it in the hands of the Supreme Court. I recall the appellees' attorney using the same argument at the February 22nd hearing. It was my feeling, then, that he was right and I was at a loss to understand, at that time,—and I continue to be now—how any case could be in both the District and Supreme Courts at one and the same time. Obviously no case can be. But, if appellees' attorney was right then, he must still be right now. Ergo, this Court has been divested of jurisdiction and can taken no action whatsoever.

The Court should have so ruled on February 22nd but did not do so. Now the reason for this was that the appellees' attorney was apparently unwilling to accept the outcome that would have resulted. He did not want the action to stop until the higher Court had ruled on the supposed pending appeal. He was of the opinion that

this case could be handled piecemeal by different courts at the same time. Although this Court believed him to be wrong in this regard it went along and took action—notwithstanding the question of jurisdiction—and denied the appellants' motions.

The appellee seems to interpret the Court's denial of the motions argued on February 22nd as a ruling by this Court on the question of bias. It was not and was never intended to be. The Court felt rather that this question of bias and interest should be presented as one of the main points in the appeal taken from the action of the appellee—Board; that it was not a collateral issue and should not be treated as such. The appellants' attorneys have read the signs correctly as to the reasons for the Court's action on this particular matter or question.

As stated previously, if the appellee is right then this Court has been divested of jurisdiction and must proceed no further. But, for the sake of being able to continue we will assume that he is not right. In such event the question of bias and interest on the part of the State Banking Board and its members has yet to be determined by this Court and as a part of this appeal.

As a matter of practical reasoning perhaps the Court does not have to resort to assuming the appellee to be wrong. It could very well be that the appellants have had some second thoughts regarding their appeal of the Court's Order of February 27, 1973. I do not know that this is true but it would seem so inasmuch as the file in this case was received in toto from the Office of the Burleigh County Clerk of Court during the last week of June, 1973. Logically, if the appeal was viable the file would have by then been forwarded to the Clerk of the Supreme Court. Since it had not been so forwarded, and

since no request for same has been communicated to this Court in the ensuing period of time, it could be concluded that this Court still had jurisdiction by reason of the appeal not having been followed through. In any event, the file is here and in this Court which would not be the case if the Supreme Court were considering it on appeal.

This Court will now proceed to determine the question of bias and interest on the part of the State Banking Board believing that in doing so it does have the requisite jurisdiction on such question and will not be usurping the prerogatives of our Supreme Court.

Was there in fact bias and interest on the part of the Board and its members? The record is replete with specific instances of this. The appellant is the one and only 6-05 financial institution in this state. As such it may under the law do many things which are not allowed to regular and other financial institutions. Because of this it is in direct competition with every other banking outlet in the state. The members of the Board are all active bankers in direct competition with FAB. New Jersey State Board of Optometrist vs. Nemitz, 90 Atl. 2d 740, In re: Heirich, 140 N.E. 2d 825, 67 A.L.R. 2d 827; State ex rel. Miller vs. Adderidge, 103 So. 835, 39 A.L.R. 1470; Stammer vs. Board of Regents of the University of the State of New York, 39 N.E. 2d 913; Smith vs. Department of Registration and Education, 106 N.E. 2d 722; Hogan vs. State, 104 So. 598; Johnson vs. Michigan Marketing Board, 295 N.W. 346; Sak's & Co. vs. Beverly Hills, 237 P. 2d 32.

The appellees herein instead of resorting to the administrative procedure prescribed by Ch. 28-32 N.D.C.C. chose rather to institute various lawsuits in the state

courts in attempts to harass the appellants and thus ultimately get rid of them. An action was instituted seeking the assistance of the Federal District Court in securing an injunction against FAB but this attempt was unsuccessful. Although the appellees herein are not the named parties-plaintiff and the Security & Exchange Commission was, the learned Judge saw through this and pointed out that the records relied upon by the plaintiff were records which originated from the State Banking Board and Bank Examiner. Securities and Exchange Commission, Plaintiff-Appellant, vs. FAB, Defendants-Appellees, U. S. Court of Appeals for the Eighth Circuit. In the case immediately cited the Federal Court, from the records submitted to it, also made a finding to the effect that insolvency of FAB had not been proved. Finally the federal court applied the doctrine of federal abstention pending final proceedings in state court.

Clearly the foregoing recital of action taken by the appellees prior to bringing FAB before it on June 19, 1972 to be "judged" through the process of an administrative hearing is sufficient indication that the Board and its members were in no position to do any "judging" and should not have done so. Without question they had prejudged the case. The same complaints and subject matter had been included before in the various proceedings in state and federal courts. For the most part these had all failed. The fact that the hearing was finally held would dictate a different intended result than had previously occurred. It was not unlike a game of poker played with a stacked deck. The "hole card" was already exposed.

The very makeup of the Board was and is all wrong. As one District Judge has previously remarked: "The Bank Examiner shouldn't be Chairman of the Banking

Board. He is an employee." Picture, if you will, a military court-martial with a Corporal for a chairman and the other members Major Generals.

The Board was already committed to a position, and so was its Chairman, the final result could not have been other than a foregone conclusion.

Bias and interest having been found at least to this Court's satisfaction, it does not usually follow that due process would emanate from such a tribunal. Members of administrative boards perform judicial functions as laid out for them by law. It is they who decide the facts and their findings may not be overturned by the courts. Williams Electric Co-op vs. Montana-Dakota Util. Co., 79 N.W. 2d 508.

The case of Gibson vs. Berryhill, 36 L. Ed. 2d 488, handed down by the U. S. Supreme Court on May 7, 1973, has been cited by the appellants herein and a copy of the opinion has been furnished for the Court's convenience. This case is very much in point here. From its reading I conclude that the opinions of Judge Van Sickle of the United States District Court for the District of North Dakota, and Judge VanPelt, Senior District Judge sitting on the U. S. Court of Appeals for the Eighth Circuit, would have been decided differently with respect to the doctrine of federal abstention had such decision been made available to them prior. It is stated in Gibson vs. Berryhill, supra, that "it is sufficiently clear from our cases that those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes (cases cited)." It goes on to say: "Most of the law concerning disqualification because of interest applies with equal force to administrative adjudicators."

The question is asked: Has FAB properly preserved its rights to raise the issue of denial of a fair trial and due process? The dilemma it finds itself in is understood and appreciated by this Court. It's a case of "Damned if you do," and "Damned if you don't." However, it is my belief that the device of special appearance utilized in this instance by FAB was correct and the only remedy available to it. Certainly under the circumstances presented here FAB could hardly expect anything else than what it got. As pointed out previously, however, the results in federal court may have been different had Gibson vs. Berryhill been released sooner on the important question of federal abstention.

Having gone through this record page by page and item by item I am not going to stop here and consider the task at an end. I, of course, readily recognize that I could be in error on the first question presented relating to the subject of bias and interest. I could be wrong in deciding that these things did exist. And I also could be wrong in deigning to decide this question at all in view of the supposedly pending appeal.

Without touching upon each and every finding and conclusion made by the appellees herein, the Court finds itself in general agreement with the appellants' assertions that most of the findings are mere conclusions and not based on proven fact. Some are admitted by the appellants but are outside the issues here involved. Some relate to individuals and corporate persons not parties to this action.

From the record I cannot say where FAB is solvent or insolvent. The State Bank Examiner, Mr. Ellwein, who is also the presiding officer of the appellee-board, says that FAB is insolvent based upon examination made by his deputies. Some of these on cross-examination were

not sure that the insolvency existed and admitted that if they had used a different yardstick the results would have reflected a condition of solvency. The Federal Court could not agree from the records of the appellees which were presented to it that the condition of insolvency existed. Neither did the Examiner for the Internal Revenue Service. In compiling their report the Deputy Examiners failed to assign to many of the appellants' holdings any value whatsoever, whereas the record seems to indicate that some of these at least were of substantial value. The capital notes were written off entirely as being of no value. It appears that the main reason for this was because of the fact that prior approval of the Examiner had not been obtained. The record shows, however, that FAB sought such prior approval but received no response from the Examiner one way or the other. At the time of the issuance of such capital notes 6-05-34 N.D.C.C. did not require trust companies to obtain prior approval. It appears that if there was in fact any juggling of figures resorted to for the purpose of obtaining previously determined and desired results that this practice was indulged in by both sides and not only by FAB. This all lends credence to the old saying that you can prove anything with figures. Mark Twain was reputed to have made the following statement on one occasion: "There are three kinds of lies: white lies, damn lies, and statistics."

The Court has already expounded at some length on the subject of the existence of bias, interest, and prejudgment on the part of the Board and its individual members, and the lack of due process in conducting the hearing before the Board. This adds up to a violation of the constitutional rights of the appellants.

The appellants were palpably unable to secure a fair hearing for reasons previously enumerated. For all intents

and purposes the appellee-board has never promulgated and published any rules and regulations. With such a situation how can anyone know what the Board considers correct conduct and procedure and what is not correct. Not being bound by any ground rules of their own making how can they themselves know what should or should not be done. Further, the Board and the Examiner have not seen fit to demand an increase in the security deposit as prescribed by 6-05-29 N.D.C.C.

The record shows the Examiner, as Chairman of the Board, during the hearing received "all evidence" which is in violation of Sec. 28-32-05 providing for reception of "only evidence of probative value."

As far as can be determined from the record available in this case it does not appear as a fact that anyone, be he investor or depositor, has lost any funds because of the supposed machinations on the part of FAB. On the other hand, the appellee-State Examiner and his staff have adopted a course of action and conduct with respect to the running of the affairs of the FAB institution which seems contrived to bring appellants to their knees. Offers to work things out have been repelled, rejected, and discouraged. Orders have been made by the Examiner through his employees and staff that the appellants' customers are to be told that they will not receive back full value of their savings and may receive nothing. If this is allowed to continue such information may prove to be correct.

The Court reverses the decision of the appellee-board and finds that:

A The determination is not in accordance with the law;

B The purported hearing and subsequent findings, conclusions and order was and are all in violation of the constitutional rights of the Respondents;

C The procedure of the agency has not afforded appellants a fair hearing;

D The Findings are not supported by the evidence; and

E That the conclusions and decision are not supported by the findings of fact.

This Court is not unmindful of the serious consequences that may result from its decision and opinion. In effect it has determined that the State Banking Board is not constitutionally constituted by reason of bias and interest; that because of this the entire proceedings before the Board are null and void. Should this decision ultimately be found to be correct then steps will have to be taken to rectify the situation with respect to such Board. In essence there would no longer be a Banking Board. Notwithstanding, however, this Court subscribes to the ruling of the Court in the Alabama case entitled State ex rel. Miller vs. Adderidge, 103 So. 835, 39 A.L.R. 1470. In that case the Court ruled that plaintiff's mandamus petition demanding that the Board members recuse themselves should have been granted *even though no other tribunal would then be available to conduct proceedings.*" (Italics supplied.)

Counsel for the appellants will prepare and submit to the Court an appropriate order in keeping herewith within one week.

Dated this 27th day of August, 1973.

BY THE COURT:

/s/ M. C. Fredricks,
M. C. Fredricks,
District Judge.

STATE OF NORTH DAKOTA
STATE BANKING BOARD

In the Matter of First American Bank & Trust Company, Robert M. Hart, Robert N. Campbell, Larry Sanders, its Officers and Directors, Harvey W. Boen, Albert W. Fetzer, Ruth M. Hart, Bernard H Hillyer, Arno J. Springan, John F. Sullivan, Charles T. Welch, its Directors,

Respondents.

Specifications of Error

The following errors are hereby specified:

1. That the purported hearing before the State Banking Board was in all respects under and pursuant to the opinions of the Supreme Court of the State of North Dakota in Civil No. 8747 and Civil No. 8815, but rather was an independent proceeding pursuant to a complaint issued by an administrative agency of the State of North Dakota.

2. Findings of Fact numbered one through one hundred twenty-eight, inclusive.

3. Conclusions of Law numbered one through seventy-eight, inclusive.

4. Order that a Receiver be appointed to liquidate First American Bank & Trust Company.

5. Order Appointing Receiver.

That the above and foregoing Specifications of Error are based on the grounds:

(a) That the determination is not in accordance with law;

(b) That the purported hearing and subsequent Findings, Conclusions and Order was and are all in violation of the Constitutional rights of the Respondents;

(c) That the procedure of the agency has not afforded Appellants a fair hearing;

(d) That the Findings are not supported by the evidence;

(e) That the Conclusions and decision are not supported by the findings of fact.

Dated this 12th day of December, 1972.

/s/ Frederick E. Saefke, Jr.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-187

FIRST AMERICAN BANK & TRUST COMPANY, a Domestic Corporation, ROBERT M. HART, ROBERT N. CAMPBELL, LARRY SANDERS, HARVEY W. BOEN, ALBERT W. FETZER, RUTH M. HART, BERNARD H. HILLYER, ARNE J. SPRINGAN, JOHN F. SULLIVAN, CHARLES L. WELCH,
Petitioners,

vs.

G. W. ELLWEIN, State Examiner and Commissioner, Department of Banking and Financial Institutions; THE STATE BANKING BOARD and VICTOR ABRAHAM, Bank Examiner, All of the State of North Dakota,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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INDEX

Page

Statutory Provisions Involved 1-6

Statement of Facts 6-9

Reasons Writ Should Be Refused 8-13

"1. Is the statutory scheme for the regulation of banking institutions, in North Dakota, constitutional?" 10-11

"2. Did FAB receive a fair hearing, pursuant to 'due process of law', before said board?" 11-12

"3. Does the 'Rule of Necessity' pertain when there is another tribunal or process available for remedy?" 12-13

The Justice's Secretary 13

Conclusion 14

Appendix Index

Order Appointing Receiver ..... Appendix 1, A-1

Motion ..... Appendix 2, A-4

Order ..... Appendix 3, A-7

Return to Motion for Injunction ..... Appendix 4, A-9

TABLE OF AUTHORITIES

Table of Cases

First American Bank & Trust Company et al. v. G. W. Ellwein et al., Appendix 1, Petition for Certiorari 9, 13

Gibson v. Berryhill, 411 U.S. 564, 36 L.Ed.2d 488, 93 S.Ct. 1689 (1973) 10, 11

Marcello v. Bonds, 349 U.S. 302, 75 L.Ed. 1107, 75 S. Ct. 757 (1955) 11

North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., — U.S. —, 38 L.Ed.2d 379, 94 S.Ct. (1973) 10

Securities and Exchange Commission of U.S. v. First American Bank & Trust Company, 481 F.673 (8th Circuit 1973) 9

The Federal Trade Commission v. Cement Institute, 333 U.S. 683, 68 S.Ct. 793, 92 L.Ed. 1010 (1948) 13

U.S. ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 98 L.Ed. 681, 74 S.Ct. 499 (1954) 11

U. S. v. Anderson, 481 F.2d 685 (4th Circuit 1973) 9

Statutes

North Dakota Century Code, Section 6-01-01 .....1, 10, 12

North Dakota Century Code, Section 6-01-08 2-10

North Dakota Century Code, Section 6-03-41 ..... 3, 9

North Dakota Century Code, Section 6-03-42 ..... 3, 9

North Dakota Century Code, Section 6-05-29 12

North Dakota Century Code, Section 6-07-03 12

North Dakota Century Code, Section 6-07-04 12

North Dakota Century Code, Section 28-32-05 ..... 4, 6

North Dakota Century Code, Section 28-32-18 ..... 5, 7

North Dakota Century Code, Section 28-32-19 ..... 5, 7

Texts

A Profile of State-Chartered Banking, Conference of State Bank Supervisors (1973) 10

IN THE

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No. 74-187

FIRST AMERICAN BANK & TRUST COMPANY, a Domestic Corporation, ROBERT M. HART, ROBERT N. CAMPBELL, LARRY SANDERS, HARVEY W. BOEN, ALBERT W. FETZER, RUTH M. HART, BERNARD H. HILLYER, ARNE J. SPRINGAN, JOHN F. SULLIVAN, CHARLES L. WELCH,
Petitioners,

vs.

G. W. ELLWEIN, State Examiner and Commissioner, Department of Banking and Financial Institutions; THE STATE BANKING BOARD and VICTOR ABRAHAM, Bank Examiner, All of the State of North Dakota,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

STATUTORY PROVISIONS INVOLVED

6-01-01, North Dakota Century Code

6-01-01. Management and control—State department of banking and financial institutions.—The state department of banking and financial institutions shall be under the supervision

of the state banking board and a chief officer designated as the commissioner of banking and financial institutions, and known as the state examiner. Whenever the term state examiner is used in this Code, it shall mean the commissioner of banking and financial institutions. The state department of banking and financial institutions shall have charge of the execution of all laws relating to state banks, savings banks, trust companies, building and loan associations, mutual investment corporations, mutual savings corporations, banking institutions and other financial corporations, exclusive of the Bank of North Dakota and all credit unions, organized or doing business under the laws of this state. The same power granted herein to the state department of banking and financial institutions with reference to the corporations named in this section shall be granted to the state credit union board with reference to credit unions.

6-01-08, North Dakota Century Code

6-01-08. Appointment of state examiner—Qualifications.— The state examiner shall be appointed by the governor and confirmed by the senate, and shall hold his office for a term of four years and until his successor has been appointed, confirmed by the senate, and has qualified, unless he is removed sooner as herein provided. His term of office shall commence on the first day of July in each year next following a national presidential election. The state examiner shall be a skilled accountant, and shall not be an incumbent of any other public office in the state, or in any county, municipality, or public institution thereof, and shall not own, hold, or control any stocks, capital, or bonds, or hold the office of trustee, assignee, officer, agent, or employee of any financial institution under his jurisdiction, or of any corporation engaged in the business of guarantying or insuring the fidelity or faithful performance of the duties or the solvency of public officers or of public depositaries. The

governor may remove from office any state examiner who violates or fails to discharge faithfully the duties of his office or who becomes disqualified under the provisions of this section.

6-03-41, North Dakota Century Code

6-03-41. Issuance of capital notes or debentures—Not subject to double liability.—With the approval of the state examiner, any bank institution, through action by its board of directors taken at any time and without requiring any action by its stockholders, may issue and sell its capital notes or debentures. All capital notes or debentures shall be subordinate and subject to the claims of depositors, and at the time of issue may be subordinated and subjected to the claims of other creditors, but in no case shall be subject to assessment. The holders of capital notes or debentures as such shall not be responsible individually for any debts, contracts, or engagements of the issuing institution.

Source: S. L. 1935, ch. 92, § 1; R. C. 1943, § 6-0341.

6-03-42, North Dakota Century Code

6-03-42. Capital notes or debentures included in capital—Retirement.—The term "capital" as used in this title shall embrace the amount of outstanding capital notes and debentures legally issued by any banking institution. The capital stock of a banking institution shall be unimpaired when the amount of such capital notes and debentures as represented by sound assets exceeds the impairment as found by the state examiner. The state examiner must approve of any retirement of any capital notes or debentures, and may require the bank to issue some other form of capital before retiring the capital notes or debentures.

Source: N.D.C.C.; S. L. 1969, ch. 109.

28-32-05, North Dakota Century Code

28-32-05. Rules of procedure—Complaint—Notice of hearing—Filing and service.—The following rules of procedures shall be observed by all administrative agencies in proceedings in which the same are applicable:

1. In all proceedings brought before an administrative agency having jurisdiction of the subject matter, the petitioner, or the administrative agency when acting upon its own initiative, shall prepare and file a clear and concise statement or complaint with the agency having jurisdiction of said proceeding. Said complaint shall contain a concise statement of the claims or charges upon which the petitioner relies, and the relief sought. Upon the filing of such complaint, the appropriate administrative agency shall issue a notice for hearing, which shall fix the time and place for trial thereof upon its merits. Said notice shall inform the party proceeded against that unless an answer to such complaint is served upon the petitioner and agency giving such notice at least three days before the time specified for hearing therein that the complaint will be deemed admitted, and that the agency will enter such order as the facts and law may warrant. A true copy of the complaint and notice of hearing shall be served upon the respondent personally, or by registered or certified mail, as the agency may direct, at least twenty days before the time specified for hearing thereof unless the service of such complaint or notice of hearing is waived, in writing, by the party proceeded against, or unless the parties agree upon a definite time and place for hearing thereof with the consent of the agency having jurisdiction. Provided, however, that in case of an

emergency the agency, in its discretion, may notice a proceeding for hearing upon the merits upon less than twenty days' notice. Every party to such proceeding shall be given a reasonable time within which to prepare for such hearing, which may be extended by the agency upon good cause being shown by the applicant therefor.

2. At such hearing, the person against whom the proceedings have been instituted shall be afforded the same opportunity to present evidence and to examine and cross-examine witnesses as is permitted to parties to an action in the district court.

28-32-18, North Dakota Century Code

28-32-18. Consideration of additional or excluded evidence.— If an application for leave to adduce additional evidence is made to the court in which an appeal from a determination of an administrative agency is pending, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing or proceeding had before the administrative agency, or that such evidence is material to the issues involved and was rejected or excluded by the agency, the court may order that such additional evidence be taken, heard, and considered by such agency on such terms and conditions as the court may deem proper. After considering such additional evidence, the administrative agency may amend or modify its findings of fact, conclusions of law, and decision, and shall file with the court a transcript of such additional evidence together with its new or modified findings of fact, conclusions of law, and decision, if any.

28-32-19, North Dakota Century Code

28-32-19. Scope of and procedure on appeal from determination of administrative agency.—The court shall try and hear an appeal from the determination of an administrative agency without a jury and the evidence considered by the court shall be confined to the record filed with the court. If additional testimony is taken by the administrative agency or if additional findings of fact, conclusions of law, or a new decision shall be filed pursuant to section 28-32-18, such evidence, findings, conclusions, and decision shall constitute a part of the record filed with the court. After such hearing, the court shall affirm the decision of the agency unless it shall find that such decision or determination is not in accordance with law, or that it is in violation of the constitutional rights of the appellant, or that any of the provisions of this chapter have not been complied with in the proceedings before the agency, or that the rules or procedure of the agency have not afforded the appellant a fair hearing, or that the findings of fact made by the agency are not supported by the evidence, or that the conclusions and decision of the agency are not supported by its findings of fact. If the decision of the agency is not affirmed by the court, it shall be modified or reversed, and the case shall be remanded to the agency for disposition in accordance with the decision of the court.

STATEMENT OF FACTS

The North Dakota State Banking Board, acting on its own initiative, § 28-32-05 N.D.C.C., filed a complaint against these Petitioners on or about May 26, 1972. A response entitled, "Special Appearance and Return", was filed by these Petitioners on or about June 15, 1972. On these pleadings, the State Banking Board held a hearing at the State Capitol in Bismarck,

North Dakota, June 19-29, and September 13-14, 1972. The Petitioners participated fully in the hearings. The transcript of the record consists of 5 volumes for a total of 1248 pages, and lasted 12 days. They conducted an exhaustive cross-examination of Respondent's witnesses, and called and conducted original examination of witnesses who were employees of the State Banking Department. In addition, the Petitioners offered in evidence, 55, more or less, documentary exhibits. Exhibit A through CCC. Record reference is found in the Transcript, Vol. I, pp. XII to XIV; Vol V, pp. IV to VI. All of these exhibits were received in evidence and became a part of the record. Finally, the hearing was reopened in September of 1972 at the insistence and request of Petitioner. R 992. Petitioner then conducted a long interrogation of Bank Examiners who had signed the Report of Examination. Exhibit 119. R 994, 997 et seq.

The State Banking Board on December 11, 1972, made 128 specific Findings of Fact and 78 Conclusions of Law. An order based upon these Findings and Conclusions was entered on the same day and a receiver was appointed to liquidate the bank. Appendix 1.

An appeal was taken by Petitioner to the State District Court. The order appointing the receiver was stayed. Under the applicable statute, the evidence considered by the District Court on appeal of an administrative agency is confined to the record made before the State Banking Board. § 28-32-19, N.D.C.C. Pursuant to statute, Petitioner moved the court for an order to remand the cause to the State Banking Board for the taking of additional evidence. § 28-32-18, N.D.C.C. Appendix 2. This statute requires a showing that the evidence is material and that there are reasonable grounds for failure to adduce such evidence at the hearing. After extensive argument, both written and oral, application was denied by order of the court dated February 29, 1973. Appendix 3.

We turn now to the so-called STATEMENT OF FACTS in the Petition for Certiorari.

1. Item 1 on Page 9 of the Petition states that the Examiner had "previously, orally approved" the capital notes. There is no record support for this assertion.

2. Item 2 on Page 10 of the Petition refers to newsstories and headlines. These are not part of the record.

3. Item 3 on Page 10 of the Petition—The matters described are not part of the record.

4. Item 5 on Page 10 of the Petition—The matters described are not part of the record.

5. Item 6 on Page 10 of the Petition—This, except for the statement that the State Examiner hired deputy examiners, CPA's, in a partnership in another city, is not included in the record.

6. Item 7 on Pages 10-11—This is not included in the record.

7. Item 8 on Page 11—This is not included in the record.

8. Item 9 on Page 11—This is not included in the record.

9. Item 10 on Page 11—This is not part of the record.

10. Item 11 on Page 11—This is not part of the record.

11. Item 12 on Page 11—This is not part of the record.

12. Item 13 on Page 11—This is not part of the record.

This was one of the grounds for the motion to remand to the State Banking Board. The District Court stated in effect that the Petitioners having knowledge, during the hearing, of the Affidavit of Earle H. Campbell, could not speculate the

result of the hearing and when the order of the Board was adverse, bring the Affidavits to the attention of the court on appeal. If, in fact, Petitioners had a complaint, it was made out of time.

13. Item 12 on Page 12—There is no support in the record for the statement, ". . . and directed in the same manner what and how certain assets could be used in the examination report so that they showed the FAB with a capital deficit." It may be that what is here referred to concerns capital notes. The fact is that the so-called capital notes were required by statute to be approved by the State Examiner. § 6-03-41, N.D.C.C., and the capital notes could not be included in the capital account unless they were legally issued. § 6-03-42, N.D.C.C. *First American Bank & Trust Company et al. v. G.W. Ellwein et al.* Appendix 1, Petition for Certiorari.

14. Item 15 on Page 12—These matters do not appear on the record.

15. Item 16 on Page 12—Most of these recitals are not part of the record. The matter was before the United States Court of Appeals for the 8th Circuit, the opinion of the court by Judge Van Pelt appears in *Securities and Exchange Commission v. First American Bank & Trust Company*, 481 F. 673 (8th Circuit 1973).

Reference has been made to Petitioner's motion, Appendix 2, to the District Court, to remand the cause to the Board for the taking of additional evidence. Respondent's brief to the District Court on the motion, summarized the evidence the movant wanted to place in the record. Appendix 4. As noted, the motion was denied. Appendix 3. Nevertheless, Petitioner included these matters in his Petition here. *See* Petitioner's Appendix 52, 59, 64, 66, and 68.

Inclusion in a brief of material not part of the record on appeal is improper and censorable. *U.S. v. Anderson*, 481 F.2d 685 (4th Circuit 1973).

REASONS WRIT SHOULD BE REFUSED

"1. Is the statutory scheme for the regulation of banking institutions, in North Dakota, constitutional?"

It is difficult to determine from the Petition what it is Petitioners object to. The State Department of Banking, under management of the State Examiner, and the State Banking Board, have charge of all laws relating to state banks and trust companies. § 6-01-01, N.D.C.C. The State Banking Board is composed of six members; the State Examiner, who "shall not own, hold, or control any stock in any banks, or hold any office in or be an employee of any bank or financial institution under his jurisdiction"; § 6-01-08, N.D.C.C.; three members who shall have had five years' experience in an executive capacity in the management of a state bank in the State of North Dakota; one member who shall have had at least five years' experience in an executive capacity in the management of any state or national bank in North Dakota, and one member who shall have had at least five years' experience in an executive capacity in the management of any state chartered, Building and Loan Association. The State Examiner is Chairman of the Board, and the Attorney General is ex-officio, the attorney for the Board. § 6-01-01, N.D.C.C.

This is, in general, consistent with the format for the oversight of state banking systems in many of the states. *See A Profile of State Chartered-Banking*, prepared by the Conference of State Bank Supervisors, 1015 18th Street N.W., Washington, D.C. (1973).

It would seem that without something more, there is nothing unconstitutional about having bankers or persons with banking experience regulate the banking industry. *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, — U.S. —, 38 L.Ed.2d 379, 94 S.Ct. (1973) (Pharmacists); *Gibson v. Berry-*

hill, 411 U.S. 564, 36 L.Ed.2d 488, 93 S.Ct. 1689 (1973) (Optometrists).

It would seem clear that if there are additional matters which would warrant a determination of unconstitutionality, a record showing of such circumstances is required. *Gibson v. Berryhill*, 411 U.S. 564, 36 L.Ed.2d 488, 93 S.Ct. 1689 (1973). Rules of S.Ct. of U.S., 15, 23, 40. *U.S. ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 98 L.Ed. 681, 74 S.Ct. 499 (1954).

"2. Did FAB receive a fair hearing, pursuant to 'due process of law', before said board?"

It seems from the Petition that the Petitioners base their claim on, among other things, some sort of improper combination of functions in the State Banking Board. In the first place, combining, investigating, and prosecuting functions in the same officer is not a violation of due process. *Marcello v. Bonds*, 349 U.S. 302, 75 L.Ed. 1107, 75 S.Ct. 757 (1955). The court has noted that the extent to which an administrative agency may investigate and act upon material facts and then sit as an adjudicative body, has occasioned some divergence of views among federal courts. *Gibson v. Berryhill*, 411 U.S. 564, 36 L.Ed.2d 488, 93 S.Ct. 1689 (1973). Second, Receiver Petitioner failed to prove by evidence in the record that in fact, there was such a prejudicial combination. *U.S. ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 98 L.Ed. 681, 74 S.Ct. 499 (1954). Here, the evidence is that there was a separation of functions in fact. The examination, while under the general supervision of the State Examiner, was made by bank examiners. These included staff examiners and independent certified public accountants especially appointed for the job. There was no evidence of record that the State Examiner participated in any way in this examination. The reports of examination (Ex-

hibits 1, 2, and 119; R 5-6; 994-995), are signed individually by the examiners. The testimony of the Examiners, during an extensive interrogation of the examiners by the Petitioners, disclosed that only the bank examiners participated in the examination. Once the report of examination was made, showing insolvency (Exhibit 1), § 6-07-03 N.D.C.C., the State Examiner made a statutory finding of insolvency and took possession of the Petitioner bank. § 6-07-04 N.D.C.C. This was reported to the State Banking Board.

Thereafter, pursuant to the Board's instruction to the State Examiner, the Attorney General, the Board's statutory counsel, § 6-01-01 N.D.C.C., represented by a Special Assistant Attorney General, initiated proceedings against the Petitioners. The Special Assistant Attorney General who did not participate at any bank examination, drafted the pleadings and in due course, presented the evidence to support the allegations of the pleadings. The Board considered the evidence and made its adjudication. There simply is no record showing of unlawful combination of functions.

On the subject of prejudgment, the mere fact that the Board approves the Report of Examination, certainly cannot be said to be prejudgment of the issues. The Board conducted a hearing to determine the solvency of First American Bank & Trust Company. The approval was nothing more than a statement of the need to hold a hearing. Further, the Board was discharging its statutory responsibilities.

"3. Does the 'Rule of Necessity' pertain when there is another tribunal or process available for remedy?"

Petitioners assert that the Rule of Necessity does not apply because § 6-05-29 N.D.C.C. authorized the Attorney General to institute proceedings against any corporation as the case may require.

Questions with respect to the Rule of Necessity do not arise until some showing of prejudice has been made. There is no recorded evidence of any prejudice on the part of the Board. The failure to adduce evidence which Petitioner claims might tend to show such prejudice, was Petitioner's own doing and was without legal justification. Further, it appears that such "evidence" is not a probative of prejudice.

There is no point in expanding on the opinion of the Supreme Court of North Dakota on the subject. *First American Bank & Trust Company et al. v. G. W. Ellwein et al.*, Appendix 1, et seq., Petition for Certiorari. *See also, The Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 68 S.Ct. 793, 92 L.Ed. 1010 (1948).

THE JUSTICE'S SECRETARY

Finally, we do not understand Petitioner's complaint with respect to the Justice of the Supreme Court whose secretary was the wife of one of the Petitioners. The Petitioner has not been identified. Two things may be said. First, it should be explained how this fact could possibly prejudice the judge against the secretary's husband. We simply do not understand it, and it is not explained. Second, surely the unidentified Petitioner must have known where his wife worked, and surely he is charged with this knowledge. Here again, it seems that the parties decided to speculate the result and to register a complaint when the result was adverse.

CONCLUSION

There is no record showing of discriminatory prejudice, either in fact or in the statutory composition of the State Banking Board. On the contrary, the record is clear that there is, in fact, a separation of function in the State Banking Department.

Finally, Petitioners received a fair hearing before the State Banking Board. Complaints and objections to the conduct of the hearing when made, were out of time. There are no reasonable grounds for failure to adduce additional evidence; if there was such, at the hearing before the State Banking Board.

It is respectfully submitted that the Petition for Writ of Certiorari be denied.

Respectfully submitted

ALLEN I. OLSON
Attorney General of the State
of North Dakota
By: FRANK F. JESTRAB
Special Assistant Attorney
General of the State
of North Dakota

APPENDIX

APPENDIX A

State of North Dakota
State Banking Board

In the Matter of First American Bank & Trust Company, Robert M. Hart, Robert N. Campbell, Larry Sanders, Its Officers and Directors, Harvey W. Boen, Albert W. Fetzer, Ruth M. Hart, Bernard H. Hillyer, Arne J. Springan, John F. Sullivan, Charles L. Welch, its Directors,
Respondents.

Order Appointing Receiver

Upon the FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER, entered by the State Banking Board on Monday, December 11, 1972, and pursuant to the Judgment on Remittitur in the District Court of the State of North Dakota, in and for the County of Burleigh, in the following described action:

First American Bank & Trust Company, a domestic corporation, Robert M. Hart, Robert N. Campbell, Larry Sanders, Harvey W. Boen, Albert W. Fetzer, Ruth M. Hart, Bernard H. Hillyer, Arne J. Springan, John F. Sullivan, Charles L. Welch,
Plaintiffs and Respondents

v.

G. W. Ellwein, State Examiner and Commissioner, Department of Banking and Financial Institutions; the State Banking Board and Victor Abraham, Bank Examiner, all of the State of North Dakota,
Defendants and Appellants

being Civil Nos. 21567 and 21797 in the District Court of Burleigh County, and respectively, Civil No. 8747 and Civil No. 8815 in the Supreme Court of North Dakota, it is

ORDERED that HARRY GEORGE of Bismarck, North Dakota, be and he hereby is appointed Receiver of First American Bank & Trust Company of Bismarck, North Dakota, and upon his qualification as provided by law, he is hereby authorized and directed to collect all monies due to the said First American Bank & Trust Company and to do such other acts as are necessary to conserve its business and assets and he shall proceed to liquidate the affairs thereof in the manner provided by law, it is further

ORDERED that First American Bank & Trust Company, Robert M. Hart, Robert N. Campbell, Larry Sanders, Harvey W. Boen, Albert W. Fetzer, Ruth M. Hart, Bernard H. Hillyer, Arne J. Springan, John F. Sullivan, Charles L. Welch, their servants, agents, employees and attorneys, be and hereby are, enjoined and restrained from interfering in any manner with the property and assets of said First American Bank & Trust Company, or the conduct of the Receiver as herein directed, and they and each of them be and hereby are directed to transfer and turn over to the said Receiver, all books of account, property, assets and records of First American Bank & Trust Company, remaining in their possession, and it is further

ORDERED that the order of G. W. Ellwein, Commissioner, Department of Banking and Financial Institutions, dated June 28, 1971, putting Victor Abraham, Bank Examiner of the State of North Dakota, in possession of the books, records and other property of First American Bank & Trust Company, which order was enforced by the ORDER FOR PUNISHMENT AND WARRANT OF COMMITMENT, entered in Civil No. 21567 and Civil No. 21797, June 8, 1972, as hereinabove set forth,

be and hereby is suspended insofar, and only insofar, as this order remains in full force and effect.

Dated this 11th day of December, 1972.

/s/ G. W. ELLWEIN
G. W. ELLWEIN

/s/ RALPH L. TROM
RALPH L. TROM

/s/ W. S. RAYMOND
W. S. RAYMOND

/s/ JOHN ROUZIE
JOHN ROUZIE

/s/ JAMES H. DUNCAN
JAMES H. DUNCAN

/s/ DONALD T. NICKLAWSKY
DONALD T. NICKLAWSKY
State Banking Board

APPENDIX B

In District Court
Fourth Judicial District

State of North Dakota
County of Burleigh

First American Bank & Trust Company, a domestic corporation, Robert M. Hart, Robert N. Campbell, Larry Sanders, Harvey W. Boen, Albert W. Fetzer, Ruth M. Hart, Bernard H. Hillyer, Arne J. Springan, John F. Sullivan, Charles L. Welch,

Appellants,

vs.

G. W. Ellwein, State Examiner and Commissioner, Department of Banking and Financial Institutions; the State Banking Board and Victor Abraham, Bank Examiner, all of the State of North Dakota,

Respondents.

Civil No. 22281

Motion

Appellants in the above entitled action move the Court as follows:

1. For an injunction, pursuant to 32-06 of the North Dakota Century Code, to permanently enjoin the State Banking

Board, as presently composed and constituted, from continuing in any manner or form whatsoever in its quest to have a receiver appointed to liquidate the assets and dissolve the business affairs of Appellants, on the grounds and for the reasons:

a. That the members of the Board are competitors of the Appellants in the financial business in North Dakota, with adverse interests.

b. That members of the Board are defendants in a prior legal action commenced against them wherein Appellants are Plaintiffs;

c. That members of the Board have pre-judged the Appellants prior to their purported Findings of Fact, Conclusions of Law, and Order for the Appointment of a Receiver;

d. That the Respondents are biased and prejudiced against the Appellants;

e. That all members of the Board did not participate in the hearing and determination of the Board;

f. That during the hearing members of the Board discussed the case with persons not called as witnesses;

g. That as presently constituted the Board is unconstitutional;

all in violation of Appellants' legal and constitutional rights of due process which is more particularly set forth in the affidavit of Frederick E. Saefke, Jr., and accompanying exhibits, attached hereto and in support hereof.

2. As a remote alternative and as rather an absurd procedure, Appellants request, should the Court deny the foregoing motion, that the record be remanded to the State Banking Board under the direction of this Court that evidence pursuant to the

affidavit and exhibits attached hereto and in support hereof be received and made a part of the record in the matter before the State Banking Board.

Dated this 14th day of February, 1973.

/s/ FREDERICK E. SAEFKE, JR.
P. O. Box 1874
411 North Fourth Street
Bismarck, North Dakota 58501

THOMPSON, LUNDBERG & NODLAND
P. O. Box 1675
1025 North Third Street
Bismarck, North Dakota 58501
Attorneys for Appellants

APPENDIX C

In District Court
Fourth Judicial District

State of North Dakota
County of Burleigh

First American Bank & Trust Company, a Domestic Corporation, Robert M. Hart, Robert N. Campbell, Larry Sanders, Harvey W. Boen, Albert W. Fetzer, Ruth M. Hart, Bernard H. Hillyer, Arne J. Springan, John F. Sullivan, Charles L. Welch,

Appellants,

vs.

G. W. Ellwein, State Examiner and Commissioner, Department of Banking and Financial Institutions; the State Banking Board and Victor Abraham, Bank Examiner, All of the State of North Dakota,

Respondents.

Civil No. 22281.

Order

The motions of the appellant having come on for hearing before this court in the Burleigh County Courthouse, in Bismarck, North Dakota, on Thursday, the 22nd day of February, 1973, the Honorable M. C. Fredricks presiding, and Frederick E. Saefke, Jr. and Irvin B. Nodland, both of Bismarck, North

Dakota, appearing for the movants, and Frank F. Jestrab, Special Assistant Attorney General, 111 East Broadway, Williston, North Dakota, appearing for the respondents, and the court having examined the moving papers and the returns made is response thereto, and having heard the arguments of counsel, and having considered the matter, it is

ORDERED, that appel' nts' motion to permanently enjoin the State Banking Board, be and hereby is in all respects denied, and it is further

ORDERED that appellants' motion that the cause be remanded to the State Banking Board for the taking of additional evidence be and hereby is in all respects denied.

Dated this 29th day of February, 1973.

BY THE COURT:

M. C. FREDRICKS
District Judge

APPENDIX D

In District Court
Fourth Judicial District

State of North Dakota
County of Burleigh

First American Bank & Trust Company, a Domestic Corporation, Robert M. Hart, Robert N. Campbell, Larry Sanders, Harvey W. Boen, Albert W. Fetzer, Ruth M. Hart, Bernard H. Hillyer, Arne J. Springan, John F. Sullivan, Charles L. Welch,

Appellants,

vs.

Civil No. 22281

G. W. Ellwein, State Examiner and Commissioner Department of Banking and Financial Institutions; the State Banking Board and Victor Abraham, Bank Examiner, All of the State of North Dakota,

Respondents.

Return to Motion for Injunction

. . .

Mr. Saefke's "absurd" request is that the record be remanded to the State Banking Board "under the directions of this court," that evidence pursuant to the affidavit and exhibits attached

thereto and in support thereof be received and made a part of the record. Mr. Saefke does not identify the evidence to which he refers. The exhibits annexed to the affidavit are:

1. Order and Findings of the State Banking Board dated December 11, 1972. These are before the court on appeal and are part of the record of the Board certified to this court by the State Examiner, Exhibit 1.

2. Extracts from the deposition of G. W. Ellwein dated July 20, 1972, marked as Exhibits 2 through 5 inclusive and Exhibit 8 on Mr. Saefke's affidavit.

3. A page of the complaint in a civil action pending in this court, filed long prior to the hearing before the State Banking Board, Exhibit 6.

4. Copies of affidavit of G. W. Ellwein, dated July 6, 1971, and January 12, 1972, Exhibit 7.

5. Affidavit of Earle H. Campbell, dated June 26, 1972, Exhibit 9.

6. Copies of minutes of the State Banking Board meeting of June 28, 1971 and January 17, 1972, Exhibit 10.

7. Copies of minutes of the State Banking Board's meeting of August 9, 1971, Exhibit 11.

8. Copies of minutes of State Banking Board meetings of November 13, 1972 and December 11, 1972, Exhibit 12.

We have no way of deciphering Mr. Saefke's somewhat turgid prose, but we think that he wants to make these exhibits a part of the record. This is only a guess but in the light of the "absurd" procedure, we can do nothing else.

The only statute under which additional evidence may be received in an administrative proceeding pending on appeal is Section 28-32-18 N.D.C.C. This section reads in part:

> ". . . If an application for leave to adduce additional evidence is made to the court in which an appeal from a determination of an administrative agency is pending, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing or proceeding had before the administrative agency, . . . the court may order that such additional evidence be taken, heard, and considered by such agency on such terms and conditions as the court may deem proper. . . ."
>
> § 28-32-18 N.D.C.C.

We will assume, arguendo, that the proffered "evidence" is material. This leaves the question of whether the appellant had reasonable grounds for failure to adduce such evidence at the hearing. There is in the motion papers no grounds, reasonable or otherwise, given. Ergo, appellants have failed in their proof, and the motion must be denied.

Further, no reasonable grounds for such failure could exist. With the exception of Exhibit 12, that is the copies of the minutes of the State Banking Board's meeting held on November 13 and December 11, 1972, which we are willing to stipulate in the record, all of the exhibits were available to the respondents at the time of the hearing before the State Banking Board. During the hearing the respondents offered, and there were received, 55 exhibits more or less. The appellants produced and examined witnesses and cross-examined respondents' witnesses, and in addition to this, the record will clearly show, they conducted original examination of respondents' witnesses. The failure to introduce the "evidence" annexed to the affidavit

of Mr. Saefke, is without a reasonable excuse and the application must be denied.

This motion is the administrative law counterpart of a motion for a new trial under Rule 59(b) North Dakota Rules of Civil Procedure, upon the grounds of newly discovered evidence. The Supreme Court has reversed an order of a trial court granting a new trial upon the grounds of newly discovered evidence when such evidence could have been discovered by the exercise of reasonable diligence. *A fortiori,* it would be error to grant appellants' motion where such evidence was known to all concerned and in possession of appellants at the time of the hearing.

> "Where a movant for a new trial on the ground of newly discovered evidence knew the identity of an available witness under circumstances that pointed to the probability that the witness had knowledge of relevant facts which she refused to disclose until after trial, and the facts which she ultimately disclosed could have been discovered by disclosure proceedings under Rule 26, N.D.R.Civ.P., those facts do not constitute newly discovered evidence which could not with reasonable diligence have been discovered and produced at the trial."
>
> *Erdahl v. Hegg,* 110 N.W.2d 355 (N.D. 1961).

Finally, with respect to the affidavit of Earle H. Campbell, dated June 26, 1972, and offered now to show bias on the part of Mr. Nicklawsky, a member of the State Banking Board, no excuse exists for failure to offer this exhibit and to object to Mr. Nicklawsky's presence on the Board at the time of the hearing. Mr. Saefke thought he would speculate the result of the hearing. If it turned out to be in his favor, he would not object. If, however, the result were adverse—he would produce the Campbell affidavit, Exhibit 9. This Mr. Saefke cannot do. In *State v. Clifford,* 65 Wash. 313, 118 P. 40 (1911), it was said:

"The statute upon which this application is based . . . is as follows: 'No judge . . . shall . . . try any action . . . when it shall be established . . . that such judge is prejudiced . . .'

". . . this objection should be made orderly and in time, to the end that there should be no undue interference with the administration of justice, while at the same time parties litigant should be protected against prejudiced judges . . .

". . . we cannot conclude that it was intended by the act that a party could submit to the jurisdiction of the court by waiving his rights to object until by some ruling of the court in a case he becomes fearful that the judge is not favorable to his view of the case. In other words, he is not allowed to speculate upon what rulings the court will make on propositions that are involved in the case, and, if the rulings do not happen to be in his favor, to then for the first time raise the jurisdictional question."

State v. Clifford, supra, at 41, 42.

In *In Re Union Leader Corporation*, 292 F.2d 381 (1st Cir. 1961), the court said:

". . .

". . . petitioner's claim . . . that in this case the judge's conduct 'fair[ly] supports' . . . its conclusion that bias exists. . . . Petitioner first points to the judge's statement on March 14 that petitioner is 'in the business of attacking me.' The obvious answer to this is that if petitioner did not find the judge disqualified in 1959 for that belief, he did not become so in 1961 because he continued to be of the same opinion. Nothing is more important in an affidavit than timeliness and its counterpart, waiver . . . The statute does not permit second guessing."

In Re Union Leader Corporation, supra, at 389, 390.

See also: *501 DeMers, Inc. v. Fink*, 148 N.W.2d 820 (N.D. 1967).

Dated this 20th day of February, 1973.

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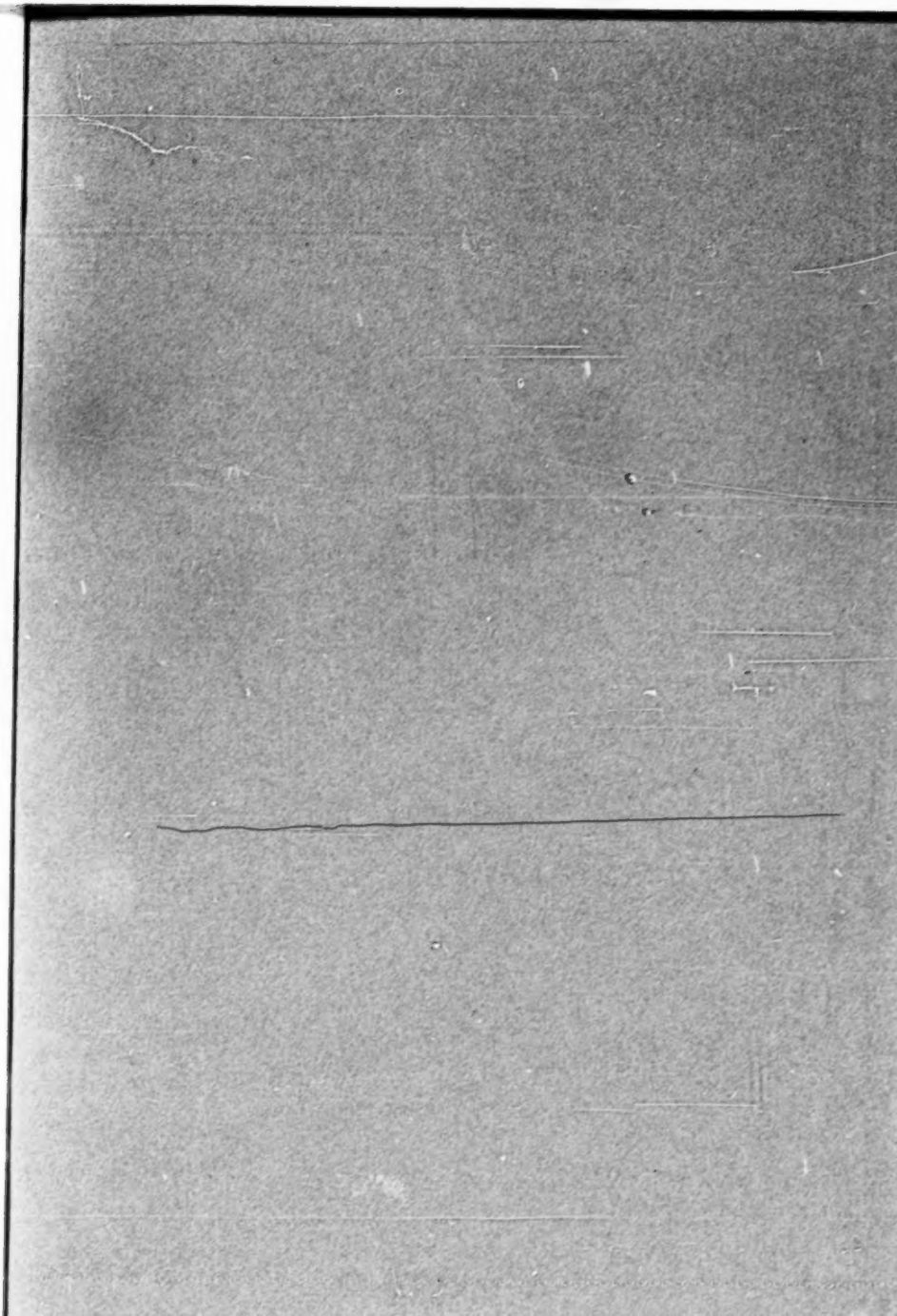

IN THE SUPREME COURT OF THE UNITED STATES

DEC 9 1974
MICHAEL RODAK, JR., CLERK

OCTOBER TERM, 1974

No. 74-187

First American Bank & Trust Company, a domestic corporation, Robert M. Hart, Robert N. Campbell, Larry Sanders, Harvey W. Boen, Albert W. Fetzer, Ruth M. Hart, Bernard H. Hillyer, Arne J. Springan, John F. Sullivan, Charles L. Welch,

Petitioners,

vs.

G.W. Ellwein, State Examiner and Commissioner, Department of Banking and Financial Institutions; The State Banking Board and Victor Abraham, Bank Examiner, all of the State of North Dakota,

Respondents.

On Petition for Writ of
Certiorari to the
Supreme Court of the State of
North Dakota

PETITION FOR REHEARING

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-187

First American Bank & Trust Company, a domestic corporation, Robert M. Hart, Robert N. Campbell, Larry Sanders, Harvey W. Boen, Albert W. Fetzer, Ruth M. Hart, Bernard H. Hillyer, Arne J. Springan, John F. Sullivan, Charles L. Welch,

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North Dakota

PETITION FOR REHEARING

The petitioners herein respectfully move this Court for an order (1) vacating its denial of petition for writ of certiorari, on November 18, 1974, and (2) granting the petition. An Order granting petitioners' application to suspend the effect of the order of this Court denying petition for writ of certiorari was signed on November 21, 1974, by Associate Justice, Honorable Harry A. Blackmun, No. A-424 (74-187) for which petitioners are sincerely thankful. As grounds for this motion, petitioners state the following:

There is pending before this Court for argument on appeal from a three judge court from the United States District Court, Eastern District of Wisconsin, the case of WITHROW v. LARKIN, No. 73-1573, during the October, 1974 Term of this Court, wherein the issues to be decided will have a substantial or controlling effect upon petitioners' case. (Copy of opinion below, the Wisconsin case printed in appendix.)

The instant case involves the constitutionality of statutes relating to administrative agencies and due process of law. The Wisconsin case to be heard and determined by this Court involves the same issues.

The Constitution of the United States, though guaranteeing "due process of law" for our people, is of no value nor effect in and of itself, for alone it can do nothing.

The judiciary is the backup and bulwark of those guarantees; but, when a state judiciary disregards the Constitution of the United States, which by its own state's Constitution (Section 3, Constitution of North Dakota) states " . . . is the supreme law of the land", (Printed on page 3, Petition for writ) then we pray the attention of this Court to review and supervise the ac-

tions of such court to uphold those constitutional guarantees.

The statutory "scheme" for the appointment of the State Banking Board and its control over the financial institutions of the State of North Dakota, contrary to the opinion of the Supreme Court of North Dakota, which states that such "scheme" is constitutional, actually holds the state banking industry in North Dakota in a position of bondage through intimidation and coercion.

The irony of this situation is that the statutes on their face are unconstitutional, in that the State Examiner, as the Commissioner of Banking and Financial Institutions (6-01-01 N.D.C.C. printed on page 4 of Petition for Writ) is also the Chairman of the State Banking Board, (6-01-03 N.D.C.C. printed on page 4 and 5 of Petition for Writ).

The State Examiner, not as an administrative officer, makes examinations, investigations, recommendations, and suggestions to the State Banking Board, an administrative agency, of which he is chairman (6-01-09 N.D.C.C. printed on pages 6 and 7 of Petition for Writ). See Judge Kelsch's opinion page A22 in Petition for Writ.

The State Banking Board then proceeds to charge, prosecute, try or judge and adjudicate its own allegations against the accused, which allegations or charges, particularly in this case, had been previously adjudged against said accused.

Unless this august Court takes command of the abuses taking place by the administrative agencies in their failure to afford "due process" to those, under their jurisdiction, accused of violating statutes and

administrative rules and regulations, and in this instance where there are no such rules and regulations, and the violations are charged and found to have been committed on an arbitrary basis, our system of jurisprudence will soon fail; our judiciary will become secondary to such agency proceedings, which are already binding the hands of the judiciary by their purported fact finding procedures.

Whereas, we sing praises in classic songs about America, in which we state "*. . . Thy liberty in law.*" we may soon be unable to sing such praises because man will have destroyed that law and made us subjects of tyranny.

Although it may appear in this case, at first blush, that there is only a local concern, this is not true, for the principle of law involved is the "due process" guarantee of the Constitution of the United States, which this Court should review, in this case, to fortify such principle in its application to all administrative proceedings throughout the United States, and the statutes of those states as they pertain to such agencies.

The statutes and facts in the Wisconsin case, to be argued on appeal before this Court, are not identical to those in petitioners' case; nevertheless, the principle of law is the same, and, whereas, not only was "due process" not exercised in the instant case, the statutory "scheme" under which the administrative agency is formed makes it impossible to follow the "due process" requirement of the Constitution of the United States.

To allow the statutory "scheme" of North Dakota, under any pretext, for the appointment of the State Banking Board, as an administrative agency, to

stand, would be a mockery and insult to the intelligence of the practicing bar and despair to the public.

This Court is the last shield against the creeping paralysis of bureaucracy, and, though it may become burdensome, nevertheless, each time such occasion raises its ugly head, this Court must rise to the challenge and defend and refortify those constitutional guarantees which are the rock foundation of this Republic.

It is not enough that prior decisions of this Court, including:

> In re Murchison, 349 US 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955) "*A fair trial in a fair tribunal is a basic requirement of due process.*" 349 US at 136.

> Kinsella v. United States, 361 US 234, 80 S.Ct. 297, 4 L.Ed. 2d. 268 (1960) "*Due process . . . has to do . . . with the denial of 'Fundamental fairness, shocking to the universal sense of justice'.*" 361 US at 246.

> Goldberg v. Kelly, 397 US 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), "*An impartial decision maker is essential*", 397 US at 271.

> Morrissey v. Brewer 408 US 471, 92 S.Ct. 2593, 33 L.Ed2d. 484 (1972), "*Our task is limited to deciding minimum requirements of due process. They include . . . (e) a 'neutral and detached' hearing body . .* ". 408 US at 488, 489.

> Gibson v. Berryhill, 411 US 564, 93 S.Ct. 1689, 36 L.Ed.2d. 488, (1973), *"Most of the law concerning disqualification because of interest applies with equal force to . . . administrative adjudicators"*. 411 US at 579.
>
> Gagnon v. Scarpelli, 411 US 778, 93 S.Ct. 1756, 36 L.Ed.2d. 656, (1973), *"an independent decision maker"*. 411 US at 786. (Emphasis added.)

established and echoed the *minimum requirements* of "due process", because there are those, in lower positions, who continue to disregard and thwart those decisions to justify the ends of their particular circumstances.

What judicious words of providence can these petitioners possibly impart to this Court, to invoke its discretion and judicial wisdom to recognize the perils of allowing the opinion of the Supreme Court of North Dakota to stand unreviewed and unreversed to the detriment of the public interest and justice in these United States?

Petitioners must prevail, not only to win as it were, but to reaffirm to the people of North Dakota, and to the public generally, that the Supreme Court of the United States and the Constitution of the United States stand undaunted and impregnable against infringement from statutes involving administrative agencies, and the administrative agencies themselves, from being allowed to continue EXTRAJUDICIAL REPRISALS against those within their jurisdiction, *in the form of a purge*, in violation of the Constitution of the United States!

CONCLUSION

In the interest of justice, we respectfully submit that this Court should grant this petition for rehearing, vacate its order of November 18, 1974, denying Petition for Writ of Certiorari and grant that petition.

Date: December 6, 1974.

Respectfully, submitted,
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CERTIFICATE OF COUNSEL

As Counsel for the petitioners, I hereby certify that this petition for rehearing is presented in good faith, and not for delay, and is restricted to the grounds specified in Rule 58 (2).

/s/ Frederick E. Saefke, Jr.
FREDERICK E. SAEFKE, Jr.
Attorney for Petitioner

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

Duane Larkin, M.D.,

Plaintiff.

vs. No. 73-C-360

Harold Withrow, D.O., et al.

Defendants.

DECISION

On November 19, 1973, this three-judge court sustained the plaintiff's procedural due process challenge to the constitutionality of Section 448.18(7) Wis. Stats. (1971). We enjoined the state medical examining board from enforcing that statute, which authorized it to suspend a physician's license for up to two consecutive three-month periods "without formal proceedings . . . where he is known or the examining board has good cause to believe" that he has engaged in certain proscribed conduct. Vague as it is, "(E)ngaging in conduct unbecoming a person licensed to practice or detrimental to the best interests of the public" qualifies as one such offense. See Section 448.18(1)(a) Wis. Stats. (1971).

Permanent revocation of a physician's license can be accomplished only through a court action prosecuted by the district attorney. The state medical examining board investigated the plaintiff, Dr. Duane Larkin, and presented charges to the district attorney. See Section 447 Wis. Stats. (1971). Neither the

propriety of the board's investigation of Dr. Larkin nor the merits of its charges against him was involved here. What we determined was that for the board temporarily to suspend Dr. Larkin's license at its own contested hearing on charges evolving from its own investigation would constitute a denial to him of his rights to procedural due process. Insofar as Section 448.18(7) authorizes a procedure wherein a physician stands to lose his liberty or property, absent the intervention of an independent, neutral and detached decision-maker, we concluded that it was unconstitutional and unenforceable.

Procedural due process is required in those instances where a person stands to see significant interference with his property rights or his liberty. Board of Regents v. Roth, 408 U.S. 564 (1972). In our view, the interference with a physician's ability to practice his profession qualifies as an interference with a property right. It is certainly "a sufficiently direct threat of personal detriment." Doe v. Bolton, 410 U.S. 179, 188 (1973).

The suspension of his license to practice medicine, as the result of charges of improper conduct, presumptively has a serious adverse effect on the physician's reputation. Thus, it is clear that the plaintiff's liberty is also at stake. 408 U.S. at 573. "There is little doubt but that a person's interest in his reputation is sufficient to trigger procedural due process protection." Suarez v. Weaver, _____ F.2d _____ (7th Cir., case number 72-1656, decided September 14, 1973). See also Wisconsin v. Constantineau, 400 U.S. 433 (1971); and Weiman v. Updegraff, 344 U.S. 183 (1952).

In several cases involving hearings required by due process, the United States Supreme Court has delved into the area of minimal due process requirements. In Gagnon v. Scarpelli, 411 U.S. 778

(1973), the Court reaffirmed the principle of Morrissey v. Brewer, 408 U.S. 471 (1972), that one of the minimum elements of such hearings is "an independent decisionmaker". 411 U.S. at 786. The state medical examining board does not qualify as such a decisionmaker. It cannot properly rule with regard to the merits of the same charges it investigated and, as in this case, presented to the district attorney.

It is true that any action taken by the board pursuant to Section 448.18 (7) is subject to judicial review under Section 227, Wis. Stats. (1971). However, that review statute goes only to the propriety of the board's *exercise* of statutory authority. We found that the very statutory authority *empowering* the board to act in the first instance was itself unconstitutional.

For these reasons, on November 19, 1973, we ordered that the plaintiff's motion for a preliminary injunction be granted. The defendants were enjoined from enforcing the provisions of Section 448.18 (7) Wis. Stats. (1971), it having been determined by us that such statute is unconstitutional.

Dated at Milwaukee, Wisconsin, this 21st day of December, 1973.

/s/ F. Ryan Duffy,
Sr. Circuit Judge

/s/ John W. Reynolds
U.S. District Judge

/s/ Myron L. Cordon
U.S. District Judge